SUBCOURSE
MP1019

EDITION
C

PRINCIPLES OF CRIMINAL LAW

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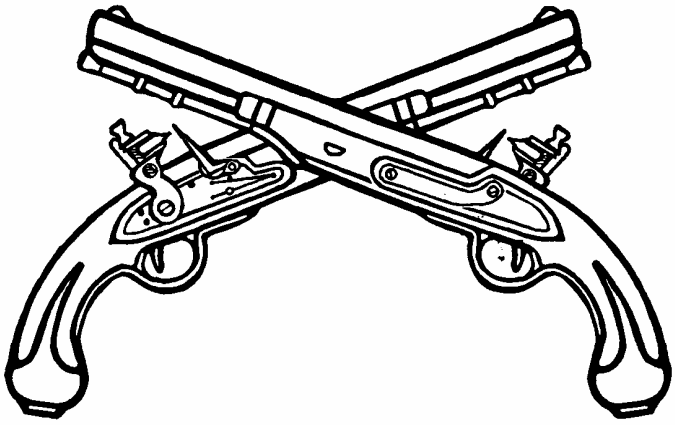

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THE ARMY INSTITUTE FOR PROFESSIONAL DEVELOPMENT

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THRU GROWTH

PRINCIPLES OF CRIMINAL LAW

Subcourse Number MP 1019

EDITION C

United States Army Military Police School
Fort McClellan, Alabama 36205-5030

4 Credit Hours

Edition Date: July 1996

SUBCOURSE OVERVIEW

This subcourse is designed as a survey of the general principles of criminal law. As a military policeman, you have one of the most demanding jobs in the Army. In times of war, you are tasked with conducting law and order operations on the battlefield. In peacetime, your responsibilities include the security of critical Army resources as well as the preservation of law and order within the Army community.

One of the most important prerequisites you must possess in order to effectively carry out these duties is a good working knowledge and understanding of criminal law. This subcourse is designed to reinforce the basic criminal law instruction which you may have already had and to expand your knowledge of this critically important area.

If you have never received instruction in this area of the law, this subcourse will provide you with a basic working knowledge of the general principles of criminal law. The successful completion of this subcourse will also help prepare you to assume the added responsibilities of command/supervision over military policemen.

There are no prerequisites for this subcourse.

This subcourse reflects the doctrine which was current at the time it was prepared. In your own work situation, always refer to the latest official publications.

Unless otherwise stated, the masculine gender of singular pronouns is used to refer to both men and women.

TERMINAL LEARNING OBJECTIVE

ACTION: Identify the elements of a crime, the participants to a crime and their respective liability (through study of the offenses of attempts, solicitation, conspiracy and accessory after the fact), the elements of proof of various offenses including crimes against persons and crimes against property. Additionally, you will be able to identify and determine the applicability of the basic affirmative defenses,

CONDITION: You will have this subcourse, pencil, and paper.

STANDARD: To demonstrate competency of this task, you must achieve a minimum score of 70 percent on the subcourse examination.

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OVERVIEW

LESSON DESCRIPTION:

In this lesson you will acquire a working knowledge of criminal law.

TERMINAL LEARNING OBJECTIVE:

ACTION: Identify the elements of a crime, the participants to a crime and their respective liability (through study of the offenses of attempts, solicitation, conspiracy and accessory after the fact), the elements of proof of various offenses including crimes against persons and crimes against property. Additionally, you will be able to identify and determine the applicability of the basic affirmative defenses.

CONDITION: You will have this subcourse, pencil, and paper.

STANDARD: To demonstrate competency of this task you must achieve a minimum score of 70 percent on the subcourse examination.

REFERENCE: The material contained in this lesson was derived from the following publications: MCM, DA Pam 27-9, FM 19-20, AR 195-2, CIDR 195-1, CIDR 195-5, CIDR 195-8, and AR 600-85.

INTRODUCTION

As a military policeman, you will continually be called upon to use your knowledge in the area of criminal law. Remember that you are preparing your investigation with a view to trial by court-martial. This knowledge will enable you to identify what crimes under the Uniform Code of Military Justice to investigate, and to recognize which facts are relevant to the investigation.

Additionally, one crime may have a variety of participants and each may be involved to a different degree. A thorough understanding of criminal law will enable the investigator to determine the respective liability of these various participants.

Depending upon the facts of a particular case, certain legal defenses to the crime under investigation may be available. Recognizing the applicability or nonapplicability of an affirmative defense will enable the investigator to recognize and record the facts critical to either proving or disproving the defense. Unless these potential defenses are recognized, critical facts may well be lost to the prosecution as well as to the defense.

PART A - THE ELEMENTS OF A CRIME

A crime is an offense against society, a social harm that is defined and made punishable by law. Just as an army exists to protect a society against external enemies, the criminal law and its agencies (police, courts, and correctional facilities) exist to protect society against its internal enemies. Crime is an attack upon society and the criminal law seeks to identify, prescribe, punish, and deter such attacks.

A crime generally consists of two basic parts: A physical element (the criminal act) and the mental element (the criminal intent).

A. Criminal Act. The difference between the average law-abiding citizen and the criminal is not that the citizen has never possessed the intent to commit a crime. Rather, it is that the law-abiding citizen does not permit this state of mind to rule his conduct.

There can be no crime without an act. Intent alone, no matter how wrongful, is not punishable and our law will not recognize intent alone as a crime. Only when such an intent is coupled with a criminal act will society recognize that a crime has been committed. If PVT Smith intends to kill someone, this intent in itself does not constitute a crime. Before PVT Smith can be held criminally liable, he must go beyond mere thoughts and actually commit an act toward the completion of his intended crime. Society's refusal to punish mere thoughts has its roots in traditional fears of "thought control" as well as in a recognition of the near impossibility of proof and enforcement.

B. Criminal Intent.

Most crimes require that the person who commits the crime have criminal intent. This principle flows from the idea that society does not usually punish accidental violations of the law. This is the general rule. There are exceptions. One is where the accused didn't intend to commit any crime, but was guilty of "criminal" negligence. An example of this is involuntary manslaughter. Here, the accused's gross negligence is essentially equivalent to that intent. Another example is carnal knowledge, where the accused's intent is immaterial. We'll return to these later.

1. General criminal intent.

In general intent crimes, it is not necessary for the prosecution to prove that the defendant intended the precise harm or result which occurred. The prosecution must prove, however, that the accused's actions were not accidental. In other words, suppose I walk up behind you and shove you. This is, of course, an assault and battery. General intent simply means that my act was not accidental; i.e., I intended to shove you; I didn't trip and accidentally bump into you.

2. Specific criminal intent. In the example above, suppose when I shove you, you fall into a desk corner, fracture your skull, and die? Is this only an assault and battery? To prove murder, the prosecutor needs to show that I intended something more than simply to shove you--he needs to prove I intended to kill you. In specific intent crimes, the prosecutor must prove not only that the defendant committed the criminal act, but also that he had the intent required by the statute to commit the crime. These crimes are easy to recognize because the statute itself sets out the specific intent required to prove the crime. Words in a statute which make it a specific intent crime include "knowingly," "willfully," "for the purpose of," "premeditated design," and "with intent to."

QUESTION: HOW CAN THE PROSECUTION EVER PROVE WHAT WAS IN THE ACCUSED'S MIND?

ANSWER: FIRST, DON'T OVERLOOK THE OBVIOUS. AFTER PROPERLY ADVISING HIM OF HIS RIGHTS, ASK THE INDIVIDUAL WHAT HE INTENDED. HE MAY WELL TELL YOU. A CONFESSION IS THE MOST CONCLUSIVE EVIDENCE OF WHAT HIS OR HER INTENT WAS AT THE TIME OF A CRIME. ALSO, HIS WORDS OR ACTIONS AT THE TIME OF THE CRIME MAY SHOW WHAT HIS INTENT WAS. INTENT MAY ALSO BE PROVEN THROUGH CIRCUMSTANTIAL EVIDENCE. A JURY MAY INFER FROM ONE'S ACTIONS THAT HE INTENDED A CERTAIN CONSEQUENCE; A PERSON IS PRESUMED TO INTEND THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACTIONS. AN EXAMPLE OF THIS CAN BE FOUND IN THE CASE OF U.S. v. AYALA, 22 MJ 77 (ACMR 1986), AFF'D 26 MJ 190 (CMA 1988). THE ACCUSED WAS CONVICTED OF THE PREMEDITATED MURDER OF HIS WIFE AND HE APPEALED. AYALA ASSERTED THAT THE GOVERNMENT FAILED TO INTRODUCE SUFFICIENT EVIDENCE FOR A COURT TO DETERMINE BEYOND A REASONABLE DOUBT THAT HE HAD COMMITTED THE OFFENSE WITH A SPECIFIC INTENT TO KILL ACCOMPANIED BY PRIOR CONSIDERATION OF HIS ACT (PREMEDITATION). THE APPELLANT REPEATEDLY STRUCK HIS WIFE WITH A THREADED OBJECT, SUCH AS A PIPE, AT LEAST 12 TIMES. THESE FORCEFUL BLOWS RESULTED IN THE VICTIM'S MULTIPLE LACERATIONS, ABRASIONS, AND BRUISES UNDER THE SCALP. MULTIPLE SKULL FRACTURES RESULTED IN SEVEN LOOSE BONE PIECES. THE VICTIM ALSO RECEIVED A PUNCTURE-TYPE WOUND OF THE LEFT ELBOW AND A ROUND HOLE-TYPE WOUND OVER HER RIGHT EAR WHICH RESULTED IN PROFUSE BLEEDING. IN AFFIRMING AYALA'S CONVICTION, THE COURT CONCLUDED THAT EVIDENCE OF THE VICIOUSNESS OF THE ASSAULT WAS SUFFICIENT CIRCUMSTANTIAL EVIDENCE FOR THE TRIAL COURT TO CONCLUDE AYALA HAD FORMED BOTH THE SPECIFIC INTENT AND THE PREMEDITATED DESIGN TO KILL.

The issue of intent is relevant to the availability of certain defenses. As an example, voluntary intoxication does not negate a general intent crime. Voluntary intoxication, however, may be presented to negate the specific intent element of a particular crime. Voluntary intoxication, then, may be a

defense to burglary (specific intent crime), but not to unlawful entry (general intent crime).

3. Intent distinguished from motive.

The term "intent" should not be confused with "motive." Motive is what prompts a person to act, while intent is more closely associated with what goal the perpetrator seeks to achieve through his actions. See United States v. Huet-Vauqhn, 43 MJ 105, (1995). In this case, an Army Captain, a medical officer, was convicted of desertion with the intent to avoid hazardous duty during Desert Storm/Shield. The Court of Appeals for the Armed Forces held that to the extent that accused quit her unit as a gesture of protest, evidence of her motive for protesting was "irrelevant to whether she possessed the specific intent to avoid hazardous duty or shirk important service." Id. at 106.

QUESTION: A MURDERS B IN ORDER TO TAKE B'S MONEY. WHAT IS A'S INTENT?

ANSWER: TO KILL.

QUESTION: WHAT IS A'S MOTIVE?

ANSWER: TO GET THE MONEY.

PART B - CRIMES AGAINST THE PERSON

A. Simple assault (Article 128, UCMJ).

Under the Uniform Code of Military Justice (UCMJ), the crime of assault is defined as an attempt to offer to do bodily harm to another with unlawful force or violence whether or not the attempt or offer is actually consummated (completed). Part IV, MCM, 1984, Para 54(c) (1) (a). A simple assault can be committed in one of two different ways: by offer or by attempt. Note that if the harm is actually inflicted, we have another crime: Assault consummated by battery.

QUESTION: WHAT IS MEANT BY SIMPLE ASSAULT?

ANSWER: THE TERM "SIMPLE ASSAULT" DESCRIBES THOSE FORMS OF ASSAULT NOT INCREASED IN SEVERITY THROUGH ACTUAL PHYSICAL CONTACT, THE USE OF EXCESSIVE FORCE, THE USE OF A WEAPON, OR THE INFLICTING OF GRIEVOUS BODILY HARM. UNDER THE UCMJ, THE PHRASE "SIMPLE ASSAULT" REFERS TO BOTH OFFER AND ATTEMPT TYPE ASSAULTS.

1. Simple Assault by offer.

An offer is simply a physical manifestation or physical demonstration. An offer type assault then, is an unlawful demonstration of violence which creates in the mind of another a reasonable fear of receiving immediate bodily harm. Part IV, MCM, 1984, Para 54(C) (1) (B) (II). The basic elements of proof in an offer type assault are that:

a. The accused offered to do bodily harm to a certain person; and

b. That the offer was done with unlawful force or violence.

No physical contact is necessary to complete an offer type assault. The key to an offer type assault is that an unlawful demonstration of force frightens a victim. An offer type assault can be intentional or the result of a culpably negligent act. By culpable negligence we mean a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a disregard for the foreseeable consequences to others of that act or omission. Part IV, MCM, 1984, Para 44C. In other words, culpable negligence is an act so reckless as to make the actor criminally liable for his action (or inaction when there was a legal duty to act).

An important element of the simple assault by offer is the victim must be aware of the perpetrator's act and must reasonably feel bodily harm is about to result. For example, PVT Doe has committed simple assault by offer when he shakes his fist in PVT Roe's face. Of course, PVT Roe must see the fist, reasonably believe he may get hit, and be placed in reasonable apprehension or fear of being hit.

In our scenario above, if PVT Doe took a swing at PVT Roe but missed, the fact that Roe was frightened would be enough to constitute an offer type simple assault. If PVT Doe swings at PVT Roe's head simply to frighten Roe and Roe does not see the fist approaching and is not put in fear, then no offer type simple assault has been committed.

It must appear to the victim that the assailant has the ability to strike the victim. Without this, the victim can have no reasonable fear or apprehension of immediate bodily harm.

The perpetrator's ability to inflict injury does not have to be real as long as impending harm is reasonably apparent to the victim. One example of this could be pointing an unloaded pistol at another as a joke. Even though the pistol could not have been fired, the act of pointing the unloaded weapon at another will constitute an assault by offer as the victim is aware of the attack and was placed in reasonable fear of bodily injury. United States v. Bush, 47 CMR 532 (NCMR 1973).

QUESTION: ARE MERE WORDS AN ASSAULT?

ANSWER: NO. MERE WORDS OR THREATS OF FUTURE VIOLENCE ARE INSUFFICIENT TO CONSTITUTE AN ASSAULT. HOWEVER, IF THE THREATENING WORDS ARE ACCOMPANIED BY A MENACING GESTURE, THERE MAY BE AN ASSAULT BY OFFER. PART IV, MCM 1984, PARA 54(C) (1) (C) (II).

NOTE: A VERBAL THREAT ONLY MAY CONSTITUTE THE OFFENSE OF COMMUNICATING A THREAT IN VIOLATION OF ARTICLE 134, UCMJ.

2. Simple Assault by attempt.

An "attempt" type simple assault requires the prosecution to prove the accused had a specific intent to inflict bodily harm and that the accused made an act which amounted to more than mere preparation and apparently tended to bring about the intended bodily harm. The key here is that criminal liability is not based on how the victim perceives the incident but is, rather, based upon what the perpetrator intends to do. Accordingly, an attempt type simple assault may be committed even though the victim had no knowledge of the incident at the time.

For example, if PVT Doe intends to hit PVT Roe, but swings and misses PVT Roe's head, PVT Doe has committed a simple assault by attempt. It is not necessary that PVT Roe actually see the fist coming in order for PVT Doe to be convicted of simple assault by attempt.

B. Assault consummated by a battery.

A battery is an assault in which the attempt or offer to do bodily harm is consummated, or completed, by the infliction of that harm. Part IV, MCM 1984, Para 54(c) (2). In other words, a battery is basically the unlawful application of force to another. The basic elements of assault consummated by a battery are:

1. That the accused did bodily harm to a certain person; and

2. That the bodily harm was done with unlawful force or violence.

In order to constitute bodily harm in an assault, any harmful or offensive touching will suffice. This is true even if the physical contact inflicts no pain and leaves no marks. Under Article 128, UCMJ, it may be a battery to spit upon another, to push a third person against another, or to set a dog at another which bites the person. Part IV, MCM 1984, para 54(c) (2) (c). The force which is applied in a battery may be applied directly by pushing a person, or indirectly by inflicting bodily injury on a person through striking the horse upon which the person is riding. Part IV, MCM 1984, para 54(c) (2) (b).

Assaults are characterized by the application, or attempted application, of unlawful force or violence to another. No lawful application of force to the person of another is a battery. Certain individuals may be justified in touching others even without their permission. One example of this would be where military police break up a fight by pulling the participants away from each other. In such a situation, the military police would be taking reasonable action to perform their duty. Similar, it is not considered a battery to touch another to attract the other's attention or to prevent injury. Part IV, MCM 1984, Para 54(c) (2) (3). United States v. Henley, 9 MJ 780 (AFCMR 1980).

For example, PVT Doe slaps PVT Roe in the face causing a bruise to his cheek. This would be an assault consummated by a battery.

The nonconsensual kissing of another constitutes an assault consummated by a battery. United States v. Server, 39 MJ 1 (CMA 1994) (Kissing, even though it generally implies a minimum use of force, is sufficient for offense of assault and battery). Spitting on another, or merely touching another's shirt or blouse without consent is sufficient to constitute assault consummated by a battery. See United States v. Bonano-Terres, 31 MJ 175, 180 (CMA 1990) (evidence that accused attempted to unbutton victim's blouse demonstrated sufficient offensive touching to amount to battery).

C. Aggravated assault. In aggravated assault, the crime is considered more severe because a dangerous weapon or other means or force likely to result in death or grievous bodily harm is used, or that grievous bodily harm has been intentionally inflicted upon the victim. The UCMJ recognizes two kinds of aggravated assault. One is an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm. The other is an assault, with or without a weapon, in which the perpetrator intentionally inflicts grievous bodily harm.

1. Aggravated assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm. This type of aggravated assault consists of four basic elements:

a. That the person attempted to do, offered to do, or did bodily harm to a certain person;

b. That the accused did so with a certain weapon, means, or force;

c. That the attempt, offer, or bodily harm was done with unlawful force or violence, and

d. That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

NOTE: Where appropriate, an additional aggravating element may be included indicating that the weapon used was a loaded firearm. This will increase the maximum permissible punishment.

A weapon is considered "dangerous" when it is used in a manner likely to produce death or grievous bodily harm. Part IV, MCM 1984, para 54(c) (4) (a) (i). The phrase "grievous bodily harm" refers to serious bodily injury beyond a black eye or a bloody nose. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries. Part IV, MCM 1984, Para 54(c) (4) (a) (iii).

The phrase "means or force" may include any means or instrumentality not normally considered a weapon. When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be said that the means or force is "likely" to produce that result. A bottle, a glass, a rock, a bunk adaptor, a piece of pipe, a piece of wood,

boiling water, drugs, or a rifle butt may be used in a manner likely to inflict death or grievous bodily harm. However, an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of force likely to produce death or grievous bodily harm, whether or not the assailant knew it was unloaded. United States v. Turner, 42 MJ 689 (ACCA 1995). Part IV, MCM 1984, para 54(c) (4) (a) (ii). This would, of course, still be an assault.

When investigating an aggravated assault with a dangerous weapon or "means or force likely," it is important to remember that it is not necessary that death or grievous bodily harm be actually inflicted. Aiming a loaded weapon at an individual without firing constitutes aggravated assault with a dangerous weapon. United States v. Cato, 17 MJ 1108 (ACMR 1984). Similarly, striking at, but missing, another's head with a pool cue or broom handle would also constitute aggravated assault with a "means likely" even though the perpetrator never hit the victim.

Another example of aggravated assault with a means or force likely to produce death or grievous bodily harm, would be a perpetrator who is HIV positive. A perpetrator who is informed he is HIV positive and who has unwarned protected or unprotected sexual intercourse with another can be convicted of aggravated assault with a means or force likely to produce death or grievous bodily harm.

In US vs. Schoolfield, 40 MJ 132 (C.M.A. 1994), the Court of Military Appeals upheld the aggravated assault of the accused who had been informed he was HIV positive. Also, his company commander counseled him on having sex and ordered him not to have sex without using "barrier protection," i.e., a condom, and without warning his prospective partner of his HIV positive status. The accused had unwarned and unprotected sexual intercourse. The Court upheld his conviction for aggravated assault with a means or force likely to inflict death or grievous bodily harm, even though the virus had not been transmitted. Further, in US vs. Joseph, 37 MJ 392 (C.M.A. 1993), the Court upheld an aggravated assault conviction under similar circumstances, except the accused used a condom. The Court held that a condom is not absolutely failsafe. Therefore, even though the accused used a condom and the victim has not tested positive for HIV, the accused's having unwarned and "protected" sexual intercourse with a partner constitutes a means or force likely to produce death or grievous bodily harm. Again, the Court upheld the accused's conviction of aggravated assault.

Also see United States vs. Reister, 40 MJ 666 (NMCMR 1994) (Unwarned and unprotected intercourse by individual with genital herpes may constitute an assault with a means likely to inflict grievous bodily harm).

2. Aggravated assault in which grievous bodily harm is intentionally inflicted. The elements of this offense are:

a. That the accused assaulted a certain person;

b. That grievous bodily harm was thereby inflicted upon such person;

c. That the grievous bodily harm was done with unlawful force or violence; and

d. That the accused, at the time, had the specific intent to inflict grievous bodily harm.

NOTE: When a loaded firearm is used, that fact may again be included as an element in aggravation.

When grievous bodily harm has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. One example of this would be intentionally knocking a person off of a high level of a grandstand, so that the resulting fall breaks his leg. This would constitute an aggravated assault intentionally inflicting grievous bodily harm because the end result (the broken leg) is a very foreseeable result of pushing someone off of such a grandstand. That inference might not be drawn if a person struck another with a fist in a sidewalk fight and the victim fractured his skull by falling and striking his head against a curb. Part IV, MCM 1984, para 54(c) (4) (b) (ii).

Normally, a fist would not be a "means likely" to produce grievous bodily harm. However, if a victim is held by one or several assailants while the others beat the victim with their fists and ultimately break the victim's nose, jaw, or rib, we may infer that the injury was intentionally brought about due to the viciousness of the attack. Part IV, MCM 1984, para 54(c) (4) (b) (ii). Also, the accused was convicted of aggravated assault with a means or force likely when he struck the victim, a German cab driver, in the head knocking him to the floor. Thereafter, the accused punched the victim 8 to 13 times in the head thereby aiding in escaping from the cab driver without paying the fare. Even though the cab driver's injuries were minor and he required no medical treatment, the ACMR found under the circumstances the accused's fists constituted a means or force likely to inflict death or grievous bodily harm. US vs. Whitfield, 35 MJ 535 (ACMR 1992). Therefore, how the accused uses his fists, especially when the victim is unable to avoid being hit, and where the accused punches, i.e., in the head, will impact the finding of fists as a means or force likely to inflict grievous bodily harm.

3. Assaults on those with a particular status. Under Articles 90, 91, and 128, UCMJ, the maximum permissible punishment for certain assaults is increased when the victim has a particular status or is performing a special function at the time of the assault. Such assaults include: assault upon a commissioned, warrant, noncommissioned, or petty officer; assault upon a sentinel or lookout in the execution of duty or upon a person in the execution of law enforcement duties; and finally, assault consummated by a battery upon a child under 16 years. In situations involving assaults upon officers, noncommissioned officers, sentinels, and those in law enforcement, the government must prove the accused specifically knew that the victim enjoyed the status in question. However, in the case of assault consummated by a

battery upon a child under 16 years, it is not necessary that the perpetrator know the child's age at the time of the assault.

D. Murder (Article 118, UCMJ). The UCMJ makes punishable the unlawful killing of another human being without justification or excuse when the accused:

- Has a premeditated design to kill;

- Intends to kill or inflict great bodily harm;

- Is engaged in an act which is inherently dangerous to another and displays a wanton disregard of human life; or

- Is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

This statute establishes four types of murder. We do not refer to the "first degree" or other murders by "degree" in the military. Article 118, then, forbids four types of unlawful killing: premeditated murder, intentional murder, wanton murder, and felony murder. Premeditated murder and felony murder are known as "capital offenses" because the death penalty may be imposed if "special circumstances" of Rules for Court Martial/004 are present.

1. Premeditated murder, Article 118(1), UCMJ. This offense consists of four elements:

   a. That a certain named or described person is dead;

   b. That the act resulted from the act or omission of the accused;

   c. That the killing was unlawful; and

   d. That, at the time of the killing, the accused had a premeditated design to kill.

A murder is not premeditated unless the thought of the killing was consciously conceived, and the act or omission by which the life was taken was intentional. Premeditated murder occurs after the accused forms a specific intent to kill someone and considers the killing. U.S. v. Vida, 26 MJ 822 (ACMR 1988). It is not necessary that the intention to kill had been entertained for any particular or considerable length of time. Part IV, MCM 1984, para 43(c) (2) (a).

QUESTION: HOW CAN A PERSON'S INTENT BE PROVEN?

ANSWER: A CONFESSION IS ONE WAY. THE SUSPECT'S OWN STATEMENTS MAY BE THE MOST CONCLUSIVE INDICATION OF WHAT HIS OR HER INTENT WAS AT THE TIME OF THE CRIME.

QUESTION: ARE THERE ANY OTHER WAYS TO PROVE INTENT?

ANSWER: YES. PREMEDITATION MAY BE INFERRED THROUGH THE SURROUNDING CIRCUMSTANCES, SUCH AS THE MANNER IN WHICH THE VICTIM WAS KILLED. PREMEDITATION CAN BE INFERRED FROM THE VICIOUSNESS OF THE ATTACK. UNITED STATES V. MATTHEWS, 13 MJ 501 (ACMR, 1982). IN MATTHEWS, THE VICTIM WAS STABBED 53 TIMES. IN ANOTHER CASE, THE DEFENDANT'S CONVICTION FOR PREMEDITATED MURDER WAS UPHELD AFTER THE EVIDENCE INDICATED THAT THE APPELLANT CHASED THE VICTIM UNTIL SHE WAS RENDERED UNCONSCIOUS. HE THEN TIED HER UP, RAPED HER, AND AFTER PUTTING A TOWEL AROUND HER NECK TO CATCH THE BLOOD, PROCEEDED TO SLIT HER THROAT. HE THEN FINISHED UP BY STABBING HER 32 TIMES. UNITED STATES V. TEETER, 12 MJ 716 (ACMR 1981). PRIOR ANGER AND PRIOR THREATS MADE AGAINST A VICTIM CAN ALSO BE CONSIDERED INDICATIVE OF PREMEDITATION. UNITED STATES V. BULLOCK, 10 MJ 674 (ACMR 1981).

QUESTION: WHAT IF THE ACCUSED INTENDED TO KILL A, BUT MISSED AND KILLED B?

ANSWER: WHEN THE ACCUSED WITH A PREMEDITATED DESIGN TO KILL ATTEMPTS TO UNLAWFULLY KILL A CERTAIN PERSON BUT, BY MISTAKE OR INADVERTENCE, KILLS ANOTHER PERSON, THE ACCUSED IS STILL CRIMINALLY RESPONSIBLE FOR A PREMEDITATED MURDER BECAUSE THE PREMEDITATED DESIGN TO KILL IS TRANSFERRED FROM THE INTENDED VICTIM TO THE ACTUAL VICTIM. PART IV, MCM 1984, 43(c) (2) (b). A GOOD ILLUSTRATION OF THE TRANSFERRED INTENT RULE IS THE CASE OF UNITED STATES V. BLACK, 11 CMR 57 (CMA 1953). THE ACCUSED AND SEVERAL OTHERS WERE IN A GROUP WHEN AN ARGUMENT ERUPTED BETWEEN BLACK AND A SOLDIER NAMED LEWIS. AT ONE POINT THE ACCUSED TOLD LEWIS, "I HAVE EIGHT ROUNDS FOR YOU IN MY M-1." THE ACCUSED THEN WITHDREW TO HIS BUNKER, PROCURED THE RIFLE, AND RETURNED. AS THE ACCUSED APPROACHED LEWIS, SOMEONE CALLED OUT "LOOK OUT, LEWIS." AS LEWIS TURNED, THE ACCUSED FIRED ONE SHOT WHICH ENTERED LEWIS' RIGHT CHEST AND, EMERGING FROM THE REAR OF THE LEFT CHEST, STRUCK A BYSTANDER, PVT KIRCHNER, IN THE ABDOMEN. IMMEDIATELY AFTER THE SHOOTING, THE ACCUSED WENT TO PVT KIRCHNER'S SIDE AND SAID "SORRY BUDDY, IT WAS NOT MEANT FOR YOU, IT WAS MEANT FOR LEWIS." THE APOLOGY, HOWEVER, WAS APPARENTLY TO NO AVAIL AS BOTH LEWIS AND KIRCHNER DIED AS A RESULT OF THEIR WOUNDS.

THE COURT OF MILITARY APPEALS NOTED THAT ONE WHO KILLS A PERSON IN A MALICIOUS EFFORT TO KILL ANOTHER IS GUILTY OF MURDER. UNDER THIS RULE, THE ACCUSED COULD BE CONVICTED OF THE PREMEDITATED MURDER OF KIRCHNER AS WELL AS THAT OF LEWIS. U.S. V. SECHLER, 12 CMR 119 (CMA 1953).

2. Intentional Murder (Article 118(2), UCMJ). If an individual succeeds in convincing a military judge or court panel that premeditation was lacking and that an unlawful killing occurred spontaneously, the offense will be intentional murder. This offense is used in those instances where the accused acted either with an intent to kill or an intent at least to inflict great bodily harm. As a general rule, it may be inferred that a person intends the natural and probable consequences of his deliberate actions. Therefore, if a person deliberately does an act which is likely to result in death or great bodily injury, it may be inferred that the death or great bodily harm was intended. Part IV, MCM, 1984, para 43(c) (3) (a). With intentional murder, the intent does not need to exist for any particular length of time before the act is committed as long as it exists at the time of the killing. One example of an intentional murder would be when the

perpetrator of a housebreaking shoots the owner of the premises who is trying to prevent the criminal's escape. Note since the offense is housebreaking this would not be felony murder.

3. Murder While Doing an Inherently Dangerous Act (Article 118(3), UCMJ). Also known as "wanton murder," the elements of proof for this offense are:

a. That a certain named or described person is dead;

b. That the death resulted from the intentional act of the accused;

c. That this act was inherently dangerous to another and showed a wanton disregard for human life;

d. That the accused knew that death or great bodily harm was a probable consequence of the act; and

e. That the killing was unlawful.

The accused must intentionally do an inherently dangerous act and show a wanton disregard of human life. This is characterized by one's disregard for the probable consequences of one's action or omission or indifference to the likelihood of resulting death or great bodily harm. Part IV, MCM 1984, para 43(c) (4) (a). The central theme that runs through examples of wanton murder is a total lack of concern for the safety of another person.

If an accused points a pistol at someone while believing the pistol to be unloaded, he would be guilty of involuntary manslaughter if the weapon fired and killed the victim (culpable negligence). However, if the accused pointed a weapon at the victim not knowing whether or not the weapon was loaded, and not caring, it would be a better case for wanton murder if the weapon fired, killing the victim.

Another example of wanton murder is throwing a live grenade toward another as a joke. Someone is killed when the grenade explodes. Another example is flying an airplane very low over a crowd just to watch the people scatter and killing someone in the process. Recently, some have considered it great sport to drop, a large rock, concrete block, or even a bowling ball from an overpass on an interstate highway on to passing vehicles below. The perpetrator may not intend to kill anyone in the vehicle but his act manifests a total lack of concern for safety of another. So if someone is killed it would be wanton murder.

Private Jones drives his automobile at a high rate of speed toward a crowd of people, hoping desperately that they all will be able to jump out of his way in time. However, one individual jumps late and is killed when the car hits him. Jones could be found guilty of wanton murder. Even though he specifically wanted to avoid killing anyone, his conduct was clearly dangerous to the crowd of people, was not justified, and showed a complete disregard for

the probable consequences of his conduct. It is highly probable that someone would be struck and killed by the vehicle.

In order to convict the accused of wanton murder, the accused must know that death or grievous bodily harm was a probable consequence of his inherently dangerous act. This knowledge may be proven from circumstantial evidence. Part IV, MCM 1984, Para 43(c) (4) (b). There are a variety of acts which can be considered inherently dangerous. These are acts which by their very nature are likely to result in grievous bodily harm or death. In the case of United States v. Judd, 27 CMR 187 (CMA, 1958), the court of military appeals concluded that a reasonable person could find a wanton and utter disregard for life where the accused holds a loaded weapon toward his wife and child, plays with the weapon by spinning the cylinder and moving the hammer back and forth, and kills his wife when the weapon discharges.

Another example is United States v. McMonagle, 38 MJ 53 (CMA 1993). In that case the accused started a sham firefight during the invasion of Panama to cover up the loss of his pistol in an off-limits bar. The court found that indiscriminately firing a weapon in an inhabited area during a sham firefight is legally sufficient to support finding of guilt for murder while engaged in act inherently dangerous to another.

4. Felony Murder (Article 118(4), UCMJ). The final category of murder defined by Article 118, UCMJ, is felony murder. Society has always recognized that certain crimes are so dangerous that they are likely to result in the death of the victim or another. If someone is killed during the perpetration or attempted perpetration of certain offense, then the perpetrator should be held criminally liable for murder. In the military, Article 118(4) punishes those unlawful killings the accused commits while engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

For example, PVT Jones uses a knife to attempt to rob SPC Smith. SPC Smith resists and struggles. During the struggle, SPC Smith is killed by PVT Jones' knife. PVT Jones is guilty of felony murder committed in the course of a robbery. This is true even if, before the robbery, PVT Jones had made a conscious decision that he would not harm anyone. All that must be established is that the death was caused by the felony. United States v. Borner, 12 CMR 62 (CMA 1953). Therefore, using our example, even if Jones would have been willing to let the whole thing drop at the first sign of resistance and the fatal struggle was the result of Smith's grabbing at Jones' hand, Jones is guilty of felony murder. In another example Jones points his knife at Smith and demands his money. As a result, Smith dies on the spot of a heart attack. Jones could be found guilty of felony murder. When someone is killed by the perpetrator of one of these named offenses, it is not a defense that the killing was unintended or accidental. Part IV, MCM 1984, para 43(c) (5) (a).

Criminal responsibility for felony murder is not restricted to the actual perpetrator of the killing. The facts in Borner involved three individuals who were convicted of rape and felony murder because one of them

shot and killed a man who was trying to stop the rape. The investigators could not determine who fired the fatal shot. The court upheld the murder convictions of each individual because each was guilty as a principal to the rape. Therefore, they were principals to the murder as well.

In the case of United States v. Hamer, 12 MJ 898 (ACMR 1982), Hamer and his companion, PFC Bean, agreed to rape a waitress in a restaurant in Germany. Hamer gave Bean a knife "to hold off" the restaurant manager. After the other patrons had left, Hamer went down a stairway and grabbed the waitress. While Hamer and the waitress were struggling, Bean killed the manager by beating him on the head and strangling him. Hamer and Bean then proceeded to rape the waitress. Hamer was convicted of felony murder.

On appeal Hamer argued that he should not be held liable for a murder which was committed by someone else, as Article 118(4) restricts the felony murder rule to the actual perpetrator of the killing. In rejecting Hamer's argument, the court relied on the Borner "principal" analysis and noted that the criminal intent necessary for conviction is the intent to commit the underlying felony, in this case rape.

Regarding the capital punishment provision of the felony murder rule, the United States Supreme Court has held that to impose the death penalty for felony murder, the accused must have either killed or have had the intent to kill. Edmund v. Florida, 458US782, 102SCt3368, 73 L.ED.2D 1140 (1982). The Manual for Courts-Martial, however, only allows for the death penalty if the accused was the actual perpetrator of the killing. Part II, MCM 1984, RCM 1004(c) (8).

E. Manslaughter (Article 119, UCMJ).

The term "manslaughter" is used to describe a number of different homicides which are not sufficiently aggravated to be treated as murder, but are too serious to go unpunished or to be treated as mere assaults. Manslaughter falls into two categories: Voluntary manslaughter in which there is usually an intent to kill. Involuntary manslaughter, in which death is not an intended consequence of the perpetrator's act.

1. Voluntary Manslaughter (Article 119(1), UCMJ). An unlawful killing, even though it is done with an intent to kill or inflict great bodily harm, will not be murder if it is committed in the heat of sudden passion caused by adequate provocation. Part IV, MCM 1984, Para 44(c) (1). This heat of passion may result from fear or rage. A person may be provoked to such an extent that in the heat of sudden passion caused by the provocation, a fatal blow is struck before self-control has returned. Although adequate provocation does not excuse the homicide, it does reduce it from murder to voluntary manslaughter. The provocation must be sufficient to excite uncontrollable passion in the mind of a reasonable person. The rage must continue throughout the attack. United States v. Seeloff, 15 MJ 978 (ACMR 1983).

The key is whether this provocation was sufficient to send a reasonable person into an uncontrollable rage. The provocation must neither be sought by the accused nor induced by the accused as an excuse for killing or doing harm. There must also be suddenness of passion. If a reasonable person would have had sufficient time to "cool off" between the provocation and the killing, the offense is murder. Part IV, MCM 1984, para 44(c) (1) (b). Examples of acts which may, constitute adequate provocation are the unlawful infliction of great bodily harm, unlawful imprisonment, and the sight by one spouse of an act of adultery committed by the other spouse. Insulting or abusive words or gestures, a slight blow with the hand or fist, and trespass or other injury to property are not, standing alone, adequate provocation.

QUESTION: What is meant by standing alone?

ANSWER: The Army Court of Criminal Appeals clarified the meaning of the qualifying clause "stand alone" in United States v. Saulsberry, 43 MJ 649 (ACCA 1995). In Saulsberry, the Army Court found the facts as follows:

The appellant was peaceably watching television in his own room when SPC Speed entered without invitation, opened the appellant's refrigerator, and consumed one of his drinks. Furthermore, the conduct was accompanied by loud and abusive remarks about the appellant. When these events led to a confrontation and shoving match that the appellant broke off, SPC Speed attacked the appellant from the rear, threw him down on the bed, began to choke him, and then subdued and humiliated him in front of other soldiers. The appellant then retreated to his corner of the room where he sat on his bed. He was again confronted by the swaggering and foul-mouthed SPC Speed who taunted him by calling him 'all sorts of names.' Specialist Speed asked, 'What are you going to do mother ----, and f--- you, what are you going to do, chicken ----?' He also challenged the appellant, 'Do you want me to teach you a lesson.' All of these epithets were delivered by SPC Speed while he stood adjacent to the appellant's bed and while he leaned over in the appellant's face in a menacing manner. Id. at 651-652.

The appellant then stabbed SPC Speed once in the heart, killing him. Id. at 650. Saulsberry was convicted at court-martial of unpremeditated murder, but the Army court found the evidence "sufficient to support only a conviction for voluntary manslaughter." Id. at 649. The court reasoned "that these provocations were adequate to provoke uncontrollable rage, fear and passion in a reasonable person. Thus, the conviction for unpremeditated murder cannot stand." Id. at 652.

2. Involuntary Manslaughter (Article 119(b) (2), UCMJ). Involuntary manslaughter can be committed in one of two ways: through culpable negligence or by causing a death while committing or attempting to commit an offense directly affecting the person, other than burglary, sodomy, rape, robbery, or aggravated arson. Note that these are the five offenses covered in the felony murder rule. As the Manual for Courts-Martial points out, culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission which is accompanied by a culpable disregard for the

foreseeable consequences to others of that act or omission. Part IV, MCM 1984, Para 44(c) (2) (e).

It would be culpable negligence to conduct target practice in such a negligent fashion that bullets are being fired toward an inhabited house within range resulting in the killing of an occupant. Another example of culpable negligence is a killing after pointing a pistol toward another as a joke and pulling the trigger believing, but without taking reasonable precaution to ascertain, that the pistol is unloaded. Also, a death resulting from carelessly leaving poisons or dangerous drugs where they may endanger a life could constitute culpable negligence. Part IV, MCM 1984, part 44(c) (2) (a).

In all of these scenarios, the person's behavior goes beyond simple negligence. In other words, the conduct is higher in magnitude than simple negligence, but falls short of intentional wrong. United States v. Riggleman, 3 CMR 70 (CMA 1952); United States v. Vaught, 49 CMR 747 (AFCMR 1975). Death is a foreseeable consequence, but not a probable one. If death is probable, the accused may be charged with wanton murder.

Using this standard, an accused could be convicted of involuntary manslaughter for the culpably negligent action of striking his four-month old daughter repeatedly because she would not stop crying while he was changing her diaper. United States v. Mitchell, 12 MJ 1015 (ACMR 1982). In Mitchell, the blows were of sufficient force to fracture the child's skull and cause a fatal brain hemorrhage. Under these circumstances, the court reasoned, the act of striking the child to stop the crying was done in a culpably negligent manner. It should be noted that the accused was withdrawing from heroin to which he was addicted at the time he killed his girlfriend's baby.

QUESTION: What about random cutting and stabbing of an unconscious victim?

ANSWER: This might foreseeably result in the death of another and supports a finding of guilty to involuntary manslaughter by culpable negligence. United States v. Cowan, 39 MJ 950 (MNCMR 1994).

The furnishing of a restricted drug is an act which is inherently dangerous to human life. United States v. Moglia, 3 MJ 216, 217 (CMA, 1977). Therefore, the furnishing and assistance in the injection of drugs can be the basis of an involuntary manslaughter charge if a death occurs from the acts. In the case of United States vs. Ninkel, 13 MJ 400 (CMA 1982), the accused and three other soldiers were in the barracks room "cutting" and "shooting up" heroin. In addition to injecting himself, the accused injected a Specialist Soukup, at Soukup's request. Another individual, Specialist Steele, entered the room. Steele purchased a quantity of heroin from one of the group, "snorted" it, and complained that he was not getting "high" enough. He purchased some more heroin, and Soukup attempted to inject the substance into Steele's arm. However, Soukup was unable to find a vein whereupon the defendant held Steele's arm which permitted the shot to be administered. As a result of the injection, Steele died. In affirming the accused's conviction for involuntary manslaughter, the court observed that the defendant knew that

the deceased had already snorted heroin, but he did not know that the deceased had earlier been drinking alcoholic beverages. Nevertheless, the defendant admitted that he was culpably negligent, because it was foreseeable that the deceased might overdose on heroin and die. Also, he admitted that the injection of heroin was the actual cause of death. United States v. Ninkel, 13 MJ 400, 401 (CMA 1982).

One of the most common charges of involuntary manslaughter based on culpable negligence arises when the accused drives while drunk and thereby causes the death of another. Driving drunk is culpable negligence, more than simple negligence. The accused did not intend to kill anyone when he drove drunk, but death to others is a foreseeable consequence of drunk driving.

Regarding omissions, it should be noted that where there is no duty to act, there can be no negligence. Part IV, MCM 1984, para 44(c) (2) (a). Therefore, if a stranger makes no effort to save a drowning person or allows a shelter challenged person to freeze or starve to death, no crime has been committed, since no legal duty to assist existed.

Therefore, if a stranger makes no effort to save a drowning person or allows a shelter challenged person to freeze or starve to death, no crime has been committed, since no legal duty to assist existed.

The other type of involuntary manslaughter involves deaths which occur during an offense directly affecting the person other than those offenses dealt with under our felony murder statute (i.e., burglary, sodomy, rape, robbery, or aggravated arson). An "offense directly affecting the person" means one affecting some particular person as rather than an offense affecting society in general. Examples of offenses directly affecting the person include the various types of assault, battery, false imprisonment, and voluntary engagement in an affray. Part IV, MCM 1984, para 44(c) (2) (b). In United States v. Madison, 34 CMR 435 (CMA 1964), the accused pointed a gun in the direction of an individual to scare him. When the hammer started to slip out from under the accused's thumb, he "swung his arm around," and the gun fired killing his wife. In affirming the conviction for involuntary manslaughter, the court noted that since the accused had no justification or excuse to point the gun at anyone, the initial action of trying to scare his intended victim amounted to an assault by attempt with a loaded weapon. Accordingly, a death resulting from the unintentional discharge of a gun used in committing an assault by attempt is involuntary manslaughter.

Another example of death resulting during the commission of one of the stated offenses involves assault consummated by a battery on the victim. The accused got into an argument with the victim. The accused unlawfully pushed the victim to the floor. The victim fell to the floor fracturing his skull on a brick fireplace hearth. He later died from this skull fracture. The accused did not intend to kill the victim, but merely pushed him during an argument that turned into a "push and shove match." However, since the death took place during the perpetration of an assault consummated by a battery, the accused can be convicted of the second type of involuntary manslaughter.

F. Negligent Homicide (Article 134, UCMJ). This is the lowest level of criminal homicide in the military. It requires a death resulting from the act of the accused, without lawful justification or excuse, just as the more serious forms of homicide. The criminal element of this offense, however, is simple negligence. Simple negligence is defined as the absence of due care, that is, an act or omission of a person who is under a duty to use due care which shows a lack of that degree of care for the safety of others which a reasonably careful person would have exercised under the same or similar circumstances.

Simple negligence is a lesser degree of carelessness than culpable negligence. Part IV, MCM 1984, para 85(c) (2). The simple negligence required for negligent homicide is less than the culpable negligence required for involuntary manslaughter and certainly less than the wanton disregard for human life required for wanton murder.

The driver who goes through a red light and strikes and kills a pedestrian may be guilty of negligent homicide. The necessary acts for negligent homicide are not so severe as to amount to criminally culpable negligence, but are far enough from the expected conduct of a prudent person to amount to simple negligence. One in charge of a water crossing exercise failed to assure that persons crossing the creek were wearing life vests and secured to tagline and that a boat was following those crossing. His conduct was simple negligence. He was properly convicted of negligent homicide when a soldier fell from the rope and drowned. United States v. Zurrigl, 15 MJ 798 (ACMR 1983). In this case, the accused who was as the person in charge had a duty to take adequate measures to protect the persons under his charge from harm. The court concluded that a reasonably prudent person in the accused's position would have ensured that the persons crossing the creek were wearing life vests and secured to a tagline and that a boat was following those crossing. Failure to do so constituted simple negligence which caused the victim's death.

Whenever the law holds an individual criminally liable for his negligence, it holds him liable only for the foreseeable consequences of the negligence. This common sense principle, also known as the theory of proximate causation, protects people from being convicted because of bizarre and remote harm which was not the natural result of their negligence.

The negligence must be "proximate cause of the death." In US v. Perez, 15 MJ 585 (AMCR 1983), the accused left her infant son with her boyfriend on 20 December 1980 and 1 January 1981. On both occasions, the child suffered injuries requiring hospitalization (a fractured skull on 20 December and 2 broken ribs, bruises on the back, and excoriations on the back and face on 2 January). The doctor's opinion was that the injuries were consistent with the child's having been struck with exceptional force more than once and that they were not caused by simple falling or other accidental means. The accused was counseled by the battalion commander (as was her boyfriend, who was also in the military). She was told that the injuries were life-threatening and she agreed to put the child in a foster home. On 13 March 1981, she took the child home for the weekend, promising not to leave

the child with the boyfriend. Nevertheless, she left the child with the boyfriend from 1630-0430 hours. The result was as follows: "massive intra-abdominal bleeding, lacerations of the liver, acute subdural hemorrhage, contusions and abrasion of the scalp, and numerous contusions of the abdominal wall, chest and back. The child was determined to be dead at 0430 hours as a result of the massive abdominal bleeding."

QUESTION: What is the issue here?

ANSWER: was the accused guilty of simple negligence and was the child's death a result "which a reasonable person would foresee". The court said yes, as "the death of the child was a natural and foreseeable consequence of her negligent act." The negligent act, of course was leaving the child with the boyfriend. In other words, "the mother's negligent failure to remove the child from the environment was a proximate cause to death."

But see United States v. Robertson, 37 MJ 432 (CMA 1993) (Evidence of accused's negligence in connection with treatment of son's eating disorder was insufficient as a matter of law to support accused's conviction of negligent homicide in connection with the death of accused's 15 year old anorexic/bulimic son).

PART C - SEX CRIMES

A major group of crimes against the person is sex crimes. The military policeman's role in the investigation of sex offenses is a tremendously important one. There may be no witnesses apart from the victim and the suspect. Since sexual misconduct is such a delicate matter, it is critical that the military investigator be acutely aware of the elements of the various sex offenses in order to properly focus on the relevant investigative issues while being as diplomatic as possible when questioning victims, witnesses, and suspects.

A. Rape (Article 120(a), UCMJ). The offense of rape consists of two elements:

1. The accused committed an act of sexual intercourse with another person; and

2. The act of sexual intercourse was done by force and without that person's consent.

Regarding the element of intercourse, any penetration, however slight, is sufficient to complete this offense. Part IV, MCM 1984, para 45(c) (1) (a). Evidence of penetration may be obtained through the victim's testimony or medical testimony or both.

COMMENT: THE ELEMENTS OF FORCE AND LACK OF CONSENT ARE NECESSARY TO THE CRIME OF RAPE. IN ORDER FOR SUCH AN ACT TO BE DONE BY FORCE AND WITHOUT CONSENT THE VICTIM MUST TAKE REASONABLE MEASURES TO RESIST.

QUESTION: WHAT IF THE VICTIM IS UNCONSCIOUS OR LACKS THE PHYSICAL OR MENTAL FACILITIES TO RESIST?

ANSWER: PHYSICAL RESISTANCE WILL NOT BE REQUIRED TO SHOW LACK OF CONSENT WHERE THE VICTIM IS INCOMPETENT, UNCONSCIOUS, OR SLEEPING. UNITED STATES V. ROBERTSON, 33 CMR 828 (AFBR 1963). IN SUCH CASES, THE ACT IS RAPE BECAUSE THE VICTIM WAS INCAPABLE OF GIVING CONSENT. SIMILARLY, THE ACQUIESCENCE OF A CHILD OF TENDER YEARS WILL NOT CONSTITUTE CONSENT AS THE CHILD IS INCAPABLE OF GIVING VALID CONSENT. UNITED STATES V. HUFF, 4 MJ 816 (ACMR 1978). PROOF OF RAPE OF A DAUGHTER BY HER FATHER MAY NOT REQUIRE PHYSICAL RESISTANCE IF INTERCOURSE IS ACCOMPLISHED AS THE RESULT OF LONG, CONTINUED PARENTAL DURESS. UNITED STATES V. DEJONCE, 16 MJ 974 (AFCMR 1983) AND US V. PALMER, 33 MJ 7 (CMA 1991).

The Court of Military Appeals upheld a rape conviction applying a similar concept to the issue of force and without consent. In US vs. Clark, 35 MJ 432 (C.M.A. 1992), the accused, a Sergeant First Class mess sergeant, was in charge of the victim, a newly assigned female private who had just arrived at the mess hall from AIT. While on duty, he ordered her to accompany him to a storage shed behind the mess hall to get some supplies. Once in the shed, the accused closed the door and positioned himself between the private and the door. He approached her asking for sex. She backed up to the wall while saying "no" to his request. Thereafter, he had sexual intercourse with her over her verbal protests. The Court gave great weight to the accused's senior NCO status and the victim's status as his subordinate and a junior soldier right out of AIT in holding the victim had reasonably resisted the accused's attack. Therefore, the Court found the sexual intercourse was by force and without the victim's consent. His rape conviction was upheld. You should note that not all cases involving differences in rank between the accused and the victim will automatically establish reasonable resistance. But this is one factor the courts will analyze.

If the victim is in possession of mental and physical faculties and fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent.

QUESTION: IS CONSENT INFERRED WHERE THE VICTIM FAILS TO RESIST BECAUSE OF THE THREAT OF PHYSICAL HARM?

ANSWER: CONSENT CANNOT BE INFERRED IN SITUATIONS WHERE RESISTANCE WOULD HAVE BEEN FUTILE OR WHERE RESISTANCE IS OVERCOME BY THREATS OF DEATH OR GREAT BODILY HARM. PART IV, MCM 1984, PARA 45(c) (1) (b). ALL THE SURROUNDING CIRCUMSTANCES MUST BE CONSIDERED IN DETERMINING WHETHER A VICTIM GAVE CONSENT, OR FAILED OR STOPPED RESISTING ONLY BECAUSE THE VICTIM REASONABLY FEARED DEATH OR THE INFLICTION OF GRIEVOUS BODILY HARM. CONSTRUCTIVE FORCE AND IMPLIED THREATS SUFFICIENT FOR A FINDING OF RAPE CAN EXIST WHERE THE VICTIM IS OUTNUMBERED BY ATTACKERS, THE VICTIM NOTICES THAT THE ATTACKERS HAVE READY ACCESS TO A WEAPON, AND THE ATTACK TAKES PLACE IN A DESOLATE LOCATION. UNITED STATES V. LEWIS, 6 MJ 581 (ACMR 1978). IN SUCH A SITUATION, LACK OF PHYSICAL RESISTANCE MAY BE JUSTIFIED BECAUSE "TO DEMAND THAT A VICTIM SACRIFICE HIS OR

HER LIFE TO PROTECT VIRTUE NOT ONLY WOULD REPRESENT A MISPLACED SENSE OF VALUES BUT WOULD ALSO UNJUSTLY RAISE AN INFERENCE AND AN EYEBROW WHENEVER A RAPE VICTIM LIVED TO TELL THE TALE."

In United States v. Webster, 40 MJ 384 (CMA 1994), the Court of Military Appeals stated "in United States v. Bonano-Torres, 31 MJ 175, 179 (CMA 1990), this court expressly declined to adopt 'an inflexible rule establishing resistance as a necessary element of' rape... In United States v. Watson, 31 MJ 49 (CMA 1990), this court similarly held that proof of a 'manifestation of lack of consent' does not require 'some positive' action or response by the victim... (The Court) rejected a notion that the rape victim had 'an independent, affirmative duty' to resist an attacker in order to prove the element of lack of consent." The Court now looks at the "totality of the Circumstances" to determine consent or lack thereof and the appropriate level or measure of resistance by the victim.

QUESTION: UNDER THE UCMJ, CAN A WOMAN RAPE A MAN?

ANSWER: PRIOR TO OCTOBER 1992 A WOMAN COULD ONLY BE CHARGED WITH RAPE UNDER THE THEORY OF PRINCIPALS AS AN AIDER AND ABETTOR. THE PERPETRATOR HAD TO BE A MAN AND THE VICTIM A WOMAN, NOT HIS WIFE. IF ANOTHER WOMAN ENTICED THE VICTIM TO A REMOTE LOCATION TO BE RAPED BY A MAN, HELD DOWN THE VICTIM WHILE THE MAN RAPED HER, OR STOOD WATCH FOR THE AUTHORITIES DURING THE RAPE, THAT WOMAN COULD BE CONVICTED OF RAPE AS AN AIDER AND ABETTOR. AFTER OCTOBER 1992, THAT WOMAN COULD STILL BE CONVICTED OF RAPE ON THE PRINCIPAL THEORY. HOWEVER, A CHANGE IN ARTICLE 120, UCMJ, MADE RAPE GENDER NEUTRAL. SEXUAL INTERCOURSE IS STILL REQUIRED. THEREFORE, THE PERPETRATOR CAN BE MALE OR FEMALE AND THE VICTIM MUST STILL BE OF THE OPPOSITE SEX. THE "HOMOSEXUAL RAPE" IS CHARGED AS FORCIBLE SODOMY.

QUESTION: UNDER THE UCMJ, CAN A HUSBAND RAPE HIS WIFE?

ANSWER: AFTER THE CONGRESSIONAL CHANGE TO ARTICLE 120, UCMJ, IT IS LEGALLY POSSIBLE FOR A HUSBAND TO RAPE HIS WIFE. IF HE HAS SEXUAL INTERCOURSE WITH HER BY FORCE AND WITHOUT HER CONSENT, HE CAN BE CONVICTED OF RAPING HER. LIKEWISE, IF THE WIFE DOES THE SAME TO HER HUSBAND, SHE CAN BE CONVICTED OF RAPE.

B. Carnal Knowledge (Article 120(b), UCMJ). Carnal knowledge is having sexual intercourse with a child under the age of 16, who is not the accused's lawful spouse, under circumstances not amounting to rape. It is commonly referred to as "statutory rape". As a matter of law, a child under the age of 16 is deemed incapable of giving valid consent, so consent is not an issue. As in rape, any penetration, however slight, is sufficient to complete the offense. In 1996, Congress amended the UCMJ to make carnal knowledge gender neutral.

Prior to 1996, there was no defense to the crime of carnal knowledge; it was a strict liability crime. It was the fact of the sexual intercourse with a child and not the accused knowledge of the child's age which fixed criminal liability. Consequently, the accused could be prosecuted for having

sexual intercourse with an underage child, even if the child claimed to be 16. Included in the 1996 amendment was the defense of mistake of fact. It is a defense if: 1) the victim was at least 12 years old, and, 2) the accused reasonably believed that the victim at the time of the offense had attained the age of sixteen. The accused has the burden of proving this defense by a preponderance of the evidence.

C. Sodomy (Article 125, UCMJ). Sodomy is the engaging in unnatural carnal copulation either with another person of the same or opposite sex or with an animal. It is considered unnatural carnal copulation for a person to take into his or her mouth or anus the sexual organ of another person or of an animal; or to place his or her sexual organ into the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation in any opening of the body of an animal. Part IV, MCM 1984, para 51(c). Note: consent by the victim is not a defense regardless of the victim's age.

Depending upon the facts of the particular case at hand, two elements in aggravation may be added to the requisite elements of the crime. One such element is added when the act is done with a child under the age of 16 years, and the other element is added when the act is done by force and without the consent of the other person.

It should be noted that the offense of sodomy may be committed between a husband and wife. Such cases, however, would be difficult to prosecute. Coltner v. Henry, 394 F.2d 873 (7th Cir. 1968). In practical terms, it would be difficult to successfully argue that a governmental purpose for prohibiting consensual sodomy within a marriage outweighs the constitutional right to marital privacy. However, Congress has seen fit not to exempt consensual sodomy committed by husband and wife.

D. Indecent Assault (Article 134, UCMJ, para 63). The offense of indecent assault consists of three basic elements:

1. That the accused assaulted a certain person not the spouse of the accused in a certain manner;

2. That the acts were done with the intent of gratifying the lust or sexual desires of the accused; and

3. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Indecent assault is a nonconsensual offense.

QUESTION: DOES THE INITIAL ASSAULT ITSELF NEED TO BE INDECENT?

ANSWER: NO. THE REQUISITE ASSAULT OR BATTERY DOES NOT NEED TO BE INHERENTLY INDECENT, LEWD, OR LASCIVIOUS (FOR EXAMPLE, CHOKING A VICTIM AND PUSHING HER

ONTO A BED), BUT IT MAY BE RENDERED SO BY ACCOMPANYING WORDS AND CIRCUMSTANCES (THREATS TO KILL THE VICTIM UNLESS SHE SUBMITTED TO ACCUSED'S SEXUAL ADVANCES AND ACCUSED'S ATTEMPT TO FORCEFULLY REMOVE VICTIM'S PANTS). UNITED STATES V. WILSON, 13 MJ 247 (CMA 1982).

QUESTION: WHAT IS INDECENCY?

ANSWER: THE TERM "INDECENT" SIGNIFIES THAT FORM OF IMMORALITY RELATING TO SEXUAL IMPURITY WHICH IS NOT ONLY GROSSLY VULGAR, OBSCENE, AND REPUGNANT TO COMMON PROPRIETY BUT TENDS TO EXCITE LUST AND DEPRAVE THE MORALS WITH RESPECT TO SEXUAL RELATIONS. PART IV, MCM 1984, PARA 90(c).

E. Indecent Acts or Liberties with a Child (Article 134, UCMJ, para 87).

The victim of this offense can be either gender including the same gender as the accused. A child is one under 16 years old. Two basic theories of misconduct are prescribed here: Indecent acts in which physical contact is required and indecent liberties in which no physical contact is required, but the act must be done within the physical presence of the child. In order to be found guilty of this offense, there must be evidence that the accused had the intent to satisfy his own lust or sexual desires or those of the victim, or both. United States v. Johnson, 35 CMR 587 (ABR, 1965).

An example of an indecent act would include placing one's hand between the legs of a child in order to arouse, appeal, or gratify one's lust, passions, or sexual desires. United States v. Payne, 41 CMR 188 (CMA 1970). Compare that with an example of an indecent liberty which would include exposing one's private parts to a child for the purpose of satisfying the accused's sexual desires. United States v. Brown, 13 CMR 10 (CMA 1953). An indecent liberty may also consist of the communication of indecent language as long as the communication is made in the physical presence of the child. Part IV, MCM 1984, para 87(c) (2).

The purpose of punishing the taking of indecent liberties with children is to protect children from those acts which have a tendency to corrupt their morals. United States v. Scott, 21 MJ 345 (CMA 1986). Moreover, the injury to the child and the consequential damage to society from the performance of a depraved act in his presence are just as great as when there is an actual physical contact between the performer and the child. The policy of protecting the morals of children is so strong that the Court of Military Appeals has found the exhibition of a pornographic magazine to girls under the age of 16 to constitute the taking of indecent liberties when it is done with the intent to gratify the accused's sexual desires. United States v. Scott, 21 MJ 345, 349 (CMA 1986). As with the other sexual crimes involving children, the consent of the child is no defense since a child of such tender years is incapable of giving valid consent to such an act.

F. Indecent Acts with Another (Article 134, UCMJ, para 90). This is a lesser included offense of indecent assault and attempted rape. It consists of three elements:

1. That the accused committed a certain wrongful act with a certain person;

2. That the act was indecent; and

3. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

As with indecent acts or liberties with a child, the offense of indecent acts with another is not limited to situations involving a female victim. In United States v. Annal, 32 CMR 427 (CMR 1963). This crime was committed when an Army captain forcefully grabbed another male and tried to embrace him. In a more blatant case, an officer was convicted of committing an indecent act after he grabbed certain parts of the anatomy of another male officer. United States v. Holland, 31 CMR 30 (CMA 1961).

Also, unlike the offense of indecent acts or liberties with a child, the offense of indecent acts with another requires no specific intent. Rather than requiring that the accused act in order to satisfy sexual urges, this offense attaches criminal liability solely on the fact that the act committed is considered indecent and is prejudicial to good order and discipline in the military or is likely to bring discredit upon the armed forces. The fact that the victim consented to an indecent act is irrelevant as long as the elements of the offense are met. United States v. Carsiro, 14 MJ 954 (ACMR 1982).

Considering the above, consensual intercourse in the presence of others can constitute an indecent act. United States v. Brundidge, 17 MJ 586 (ACMR 1983). In affirming the appellant's conviction, the Army Court of Military Review found criminal liability based upon the fact that sexual intercourse before an audience excites lust and depraves morality with respect to persons of average sensibilities and habits. Such activity is prejudice to good order and discipline.

G. Indecent Exposure, (Article 134, UCMJ, para 88). This offense requires a willful and wrongful exposure of a certain part of the accused's body to public view in an indecent manner. As this offense falls under Article 134, there is also the necessary element that the exposure be to the prejudice of good order and discipline in the armed forces or be of a nature to bring discredit upon the armed forces.

QUESTION: CAN NEGLIGENT EXPOSURE BE "INDECENT EXPOSURE?"

ANSWER: NO. "WILLFUL" MEANS AN INTENTIONAL EXPOSURE TO PUBLIC VIEW. THEREFORE, NEGLIGENT INDECENT EXPOSURE IS NOT PUNISHABLE AS A VIOLATION OF THE CODE. PART IV, MCM 1984, PARA 88(c).

"Indecent" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety but tends to excite lust and deprave the morals with respect to sexual relations. Part IV, MCM 1984, para 90(c).

In the case of United States v. Manos, 25 CR 238 (CMA 1958), the accused was convicted of indecent exposure when two air force policemen observed him naked and drying himself in the upstairs, rear bedroom window of his quarters. The court-martial found that the exposure was negligent rather than willful and convicted the accused of negligent exposure. The Court of Military Appeals overturned this conviction, holding that negligent exposure is not a punishable offense under the UCMJ.

The conviction of indecent exposure was reversed where the accused was observed nude in his own apartment by a passerby in the hallway looking in the partly opened door of the apartment. The accused made no motions, gestures, or any other action indicating that he was aware of the presence of anyone in the hallway. Such evidence is as consistent with negligence as it is with willful action. United States v. Stackhouse, 37 CMR 99 (CMA 1967).

QUESTION: HOW CAN WE DETERMINE WHETHER THE ACCUSED'S EXPOSURE WAS NEGLIGENT OR WILLFUL?

ANSWER: INTENT TO BE SEEN MAY BE PRESUMED FROM THE CIRCUMSTANCES, SUCH AS WHERE THE ACCUSED EXPOSED HIMSELF IN THE CHILDREN'S SECTION OF THE BASE LIBRARY. UNITED STATES V. BURBANK, 37 CMR 955 (AFBR 1967). IN ORDER TO BE CRIMINAL, THE EXPOSURE NEED NOT OCCUR IN A PUBLIC PLACE SO LONG AS IT IS IN PUBLIC VIEW.

H. Voyeurism/Peeping Tom (Article 134, UCMJ, para 73). Voyeurism and window peeping, although not actually sex crimes, are aggravated forms of disorderly conduct punishable under Article 134, UCMJ. The basis of the offense is generally the invading of the privacy of other persons by spying on them without their consent in their premises whether or not they are actually in view. United States v. Foster, 13 MJ 789 (ACMR, 1982).

The words "peeping tom" have a commonly understood meaning in this country as being one who sneaks up to a window and peeps in for the purpose of spying on and invading the privacy of the inhabitants. United States v. Foster, 13 MJ 789, 796 (ACMR 1982). Although there are few reported cases on the offense of "window peeping," it is certain that such conduct is offensive, would outrage the sense of decency of others, tends to disturb the peace and quiet, and provoke a breach of the peace. Therefore, such conduct falls within the definition of disorderly conduct.

PART D - EVIL WORDS

A. Communicating a Threat (Article 134, UCMJ, para 110). The purpose for punishing the communication of threats in the military is to prevent the ultimate harm which the threats forewarn. United States v. Rutherford, 16 CMR 35 (CMA 1954). Therefore, once it clearly appears that a person subject to the UCMJ has communicated a recent determination or intention to harm another person now or in the future, the crime is complete. In order to secure a conviction for this offense, four elements of proof must be satisfied:

1. That the accused communicated certain language expressing a present determination of intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;

2. That the communication was made known to that person or to a third person;

3. That the communication was wrongful; and

4. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

To establish the threat, it is not necessary to prove that the accused actually intended to do the injury threatened. However, it will not be a violation of this Article if the utterance is made as a joke or for an innocent or legitimate purpose. Part IV, MCM 1984, para 110(c). The circumstances surrounding the uttering of the words must be evaluated in order to determine whether the words were spoken as a joke or as an actual threat. United States v. Johnson, 45 CMR 53 (CMA 1972).

QUESTION: IS IT STILL A THREAT IF IT IS CONDITIONAL UPON AN "IMPOSSIBLE VARIABLE?"

ANSWER: NO. IT WILL NOT CONSTITUTE THE OFFENSE OF COMMUNICATING A THREAT WHEN SUCH A THREAT IS CONDITIONED UPON AN "IMPOSSIBLE VARIABLE." AN EXAMPLE OF THIS TYPE OF CONDITIONAL THREAT WOULD BE A HANDCUFFED PRISONER WHO TELLS HIS GUARD, "I HAVE MORE MUSCLE IN MY LITTLE FINGER THAN YOU HAVE IN YOUR WHOLE BODY, AND IF YOU TAKE THIS RESTRAINING GEAR OFF, I'LL SHOW YOU WHAT I WILL DO TO YOU." UNITED STATES V. SHROPSHIRE, 43 CMR 214 (CMA 1971). IN SUCH A CASE, THESE WORDS WOULD NOT CONSTITUTE A THREAT SINCE NO REASONABLE GUARD WOULD HAVE REMOVED THE RESTRAINING GEAR IN ORDER TO PERMIT AN ATTACK ON HIMSELF AND, THEREFORE, THIS CONDITIONAL LANGUAGE "NEUTRALIZED THE DECLARATION." THE COURT DID NOTE, HOWEVER, THAT THIS LANGUAGE COULD BE CONSTRUED AS DISRESPECT TO AN NCO. FINALLY, THE COURT NOTED THAT THE CONVICTION WOULD HAVE BEEN AFFIRMED OR UPHELD IF THE ACCUSED HAD SAID, "WHEN I GET THIS RESTRAINING GEAR OFF, I WILL SHOW YOU WHAT I'LL DO." THIS CONDITION COULD AND WOULD EVENTUALLY REASONABLY BE FULFILLED. AT SOME POINT PROPER AUTHORITIES WOULD HAVE TAKEN OFF THE ACCUSED'S RESTRAINING GEAR THEREBY FREEING HIM TO "SHOW YOU WHAT I'LL DO." SIMILARLY, IT DOES NOT CONSTITUTE THE OFFENSE OF COMMUNICATING A THREAT FOR AN AIRMAN IN THE UNITED STATES AIR FORCE TO TELL ANOTHER INDIVIDUAL, "IF THIS WERE THE CIVILIAN WORLD...I WOULD TAKE MY .357 MAGNUM AND SHOOT YOU SIX TIMES BETWEEN THE EYES." THE ACCUSED WAS AN ACTIVE DUTY MEMBER OF THE AIR FORCE, NOT A CIVILIAN. THEREFORE, BECAUSE THE STATEMENT WAS NOT REASONABLY POSSIBLE TO FULFILL, IT DID NOT CONSTITUTE A VALID THREAT. HOWEVER, BECAUSE THIS LANGUAGE WAS LIKELY TO INDUCE A BREACH OF THE PEACE, A CONVICTION FOR THE USE OF PROVOKING WORDS WAS AFFIRMED.

QUESTION: CAN IT STILL BE A THREAT TO CONDITION THE ACTION ON A POSSIBLE VARIANT?

ANSWER: YES. IN THE CASE OF UNITED STATES V. HOLIDAY, 16 CMR 28 (CMA 1954), THE ACCUSED, WHO WAS IN CONFINEMENT, REFUSED TO RETURN TO HIS CELL AFTER AN ALTERCATION WITH A GUARD. AS A RESULT, THE GUARD OBTAINED A FIRM GRASP ON HOLIDAY'S ARM AND PROCEEDED TO LEAD HIM BACK TO HIS CELL. AT THIS, THE ACCUSED DECLARED "IF I'M NOT WALKING FAST ENOUGH FOR YOU, DON'T PUSH ME OR I'LL KNOCK YOUR TEETH DOWN YOUR THROAT." FOR THIS COMMENT, HOLIDAY WAS CHARGED WITH COMMUNICATING A THREAT. IN AFFIRMING HIS CONVICTION, THE COURT NOTED THAT ALTHOUGH THE STATEMENT "DON'T PUSH ME" IMPLIED A CONDITION, IT DID NOT NEGATE A PRESENT DETERMINATION TO INJURE AS THE PRISONER WAS UNRESTRAINED. ADDITIONALLY, THE ACCUSED HAD NO RIGHT TO IMPOSE SUCH A CONDITION AS HE WAS LAWFULLY BEING LED TO HIS CELL.

Under the elements of this offense, it is not necessary that the threat be made to the victim. It is sufficient if the communication is made to a third person. The threat itself does not have to speak of physical harm to the victim. A threat to the victim's reputation is sufficient.

In the case of United States v. Frayer, 29 CMR 416 (CMA 1960), the accused was found guilty of communicating a threat after he threatened a sergeant by promising to falsely accuse him of various offenses and by threatening to get other people to make false statements against him. In affirming this conviction, the Court of Military Appeals noted that a threat to wrongfully damage the reputation or character of a person has substantially the same tendency to stir up conflict and disrupt good order and discipline as a threat to injure physically. The court also observed that the potential harm to be inflicted by attacking a person's reputation may actually be greater than the threat of physical harm. In this case, the accused threatened to despoil the good reputation of a sergeant. False accusations could easily cost the victim his noncommissioned officer grade and debase him in the eyes of his subordinates. United States v. Frayer, 29 CMR 415 (CMA 1960).

B. Bomb Threats (Article 134, UCMJ, para 109). This article covers both bomb threats and the bomb hoax. In the case of the bomb hoax, the perpetrator initiates emergency action without justifiable reason, for anyone in the target building as well as for the emergency services agencies. It results in considerable inconvenience to the residents and expense to the government. Such an action is directly prejudicial to good order and discipline. United States v. Mayo, 12 MJ 286 (CMA 1982).

C. Provoking Words or Gestures (Article 117, UCMJ). A lesser included offense of communicating a threat, this offense makes punishable the wrongful use of words or gestures toward a certain person subject to the UCMJ, when the words or gestures used are provoking or reproachful. As used in this Article the terms "provoking" and "reproachful" describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances. Historically, the main objective of this Article is to stop such manifestations of a hostile temper as, by inducing retaliation, might lead to duels or other disorders. United States v. Thompson, 46 CMR 88 (CMA 1972).

PART E - CRIMES AGAINST PROPERTY

A. Larceny (Article 121(1), UCMJ). The elements of larceny are:

1. That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

2. That the property belonged to a certain person;

3. That the property was of a certain value, or of some value; and

4. That the taking, obtaining, or withholding by the accused was done with the intent to permanently deprive or defraud another person of the use and benefit of the property or to permanently appropriate the property for the use of the accused or for any person other than the owner.

If the property is alleged to be military property, there is a fifth element, requiring the government to also prove that the property was military property. This fifth element, if proven, is an element in aggravation which will increase the maximum punishment for the offense.

In order for there to be a larceny, there must be a taking, obtaining, or withholding of the property by the thief. In order for there to be a wrongful taking, the accused must exercise some sort of dominion (ownership) or control over the item and there must be some sort of "carrying away" of the property. There would be no taking if the property in question was connected to a building by a chain, and the property had not been disconnected from the building.

QUESTION: DOES THE ACCUSED HAVE TO LEAVE THE OWNER'S PREMISES BEFORE A "TAKING" HAS OCCURRED?

ANSWER: NO. AN INDIVIDUAL DOES NOT HAVE TO LEAVE THE PREMISES WITH THE VICTIM'S PROPERTY IN ORDER FOR A TAKING TO OCCUR. AS A GENERAL RULE, ANY MOVEMENT OF PROPERTY OR ANY EXERCISE OF DOMINION OVER IT WILL BE A SUFFICIENT TAKING AS LONG AS IT WAS DONE WITH THE NECESSARY INTENT TO PERMANENTLY DEPRIVE. PART IV, MCM 1984, PARA 46(c) (1) (b). THEREFORE, IF A SOLDIER PERFORMING DUTY AT A CENTRAL ISSUE FACILITY INTENDS TO STEAL FIELD JACKETS AND IN FURTHERANCE OF HIS PLAN HIDES THE FIELD JACKETS IN THE BOTTOM OF LAUNDRY BAGS, COVERS THEM WITH FIELD JACKET LINERS SO THAT IT WOULD APPEAR THAT THE BAGS WERE BOUND FOR THE LAUNDRY, AND WHEELS THE CART TO ANOTHER AREA OF THE FACILITY, THE MOVEMENT OF THE JACKETS WITHIN THE FACILITY CONSTITUTES A SUFFICIENT TAKING TO CONSTITUTE LARCENY. UNITED STATES V. HENDERSON, 9 MJ 845 (ACMR 1980). UNITED STATES V. SNEED, 38 CMR 249 (CMA 1968).

It is important to emphasize the fact that under Article 121, UCMJ, a larceny can occur when something of value is taken from the possession of the owner or any other person. The victim of a larceny can be anyone who had a greater legal right to possession of the property than the accused. Under the UCMJ, a person can be found guilty of larceny if he wrongfully takes an item which has already been stolen once by another thief. Part IV, MCM 1984, para

46(c) (1) (c) (iii). The underlying inquiry is really who has more of a legal right to possession of the property.

A necessary element of the offense of larceny is that the property in question must be shown to be of a certain value or of some value. If government property has been stolen, the prosecutor may use government price lists to establish general value. However, wear and tear must also be taken into account in determining the value of the item when it was stolen. Part IV, MCM 1984, para 46(c) (g) (ii). As a general rule, the value of other stolen property is its legitimate market value at the time and place of the theft. Part IV, MCM 1984, para 46(c) (g) (iii). Value is a question of fact which must be determined on the basis of all the evidence admitted. Part IV, MCM 1984, para 46(c) (g) (i). You should note that if specific value cannot be established, the prosecutor must allege and prove the property had some value.

In addition to the requirement for a specific intent to permanently deprive in larceny, there is a separate requirement that the taking, obtaining, or withholding be wrongful. Part IV, MCM 1984, para 46(c) (1) (d). Generally, if someone takes or withholds the property of another, the taking is wrongful if it was done without the owner's consent. Similarly, a taking would be wrongful if property was obtained from a person under false pretenses. However, such an act is not wrongful if it was authorized by law, as would be the case in a valid repossession action. A taking will not be wrongful if it is done by someone who has a right of possession superior to that of the victim. For example, an owner of property who takes or withholds it from the possession of another is doing so wrongfully if the victim has a superior right, such as a lien, to possession of the property. Part IV, MCM 1984, para 46(c) (1) (d).

B. Wrongful Appropriation (Article 121(2), UCMJ). The elements are the same as larceny with one exception. Larceny requires that the accused's intent is that the property never be returned to the rightful owner, while wrongful appropriation requires an intent to temporarily deprive that person of his property; i.e., that the property will be returned at some later time.

QUESTION: HOW CAN WE TELL WHETHER AN ACCUSED INTENDED TO PERMANENTLY OR TEMPORARILY DEPRIVE ANOTHER OF THE PROPERTY?

ANSWER: THE INTENT OF THE ACCUSED WILL GENERALLY BE DETERMINED BY LOOKING AT THE NATURE OF THE PROPERTY TAKEN, THE CIRCUMSTANCES OF HIS TREATMENT OF THE PROPERTY, AND SOMETIMES BY HIS OWN STATEMENTS. AN EXAMPLE WOULD BE IF THE ACCUSED TAKES A STEREO AND SELLS IT TO A THIRD PERSON. IT WOULD BE PRESUMED THAT HE INTENDED THAT IT NEVER BE RETURNED TO ITS RIGHTFUL OWNER, SO HE WOULD BE FOUND GUILTY OF LARCENY. EXAMPLE OF WRONGFUL APPROPRIATION WOULD BE OBTAINING A SERVICE WEAPON BY FALSELY PRETENDING TO GO ON GUARD DUTY WITH THE INTENT TO USE THE WEAPON ON A HUNTING TRIP AND TO LATER RETURN IT. ANOTHER WOULD BE WITHHOLDING A GOVERNMENT VEHICLE FROM GOVERNMENT SERVICE BY DEVIATING FROM THE ASSIGNED ROUTE, WITHOUT AUTHORITY, TO VISIT A FRIEND IN A NEARBY TOWN. PART IV, MCM 1984, PARA 46(c) (2) (b).

It frequently happens that the accused, after being caught, claims that he always intended to return the property, but never got around to doing so. If he has never treated the property in any way which would interfere with its eventual return to the true owner, then the only circumstance which would rebut his statement is the length of time he kept the property. If he has had the property for 18 months, while in the same unit as the owner, this might suggest that his denial of his intent to keep the item permanently is less than sincere. On the other hand, if he has kept it only over the weekend, it would be easier to believe his claim. Of course, his treatment of the property might also easily rebut his claim that his intent was to return the property. If the property in question is an automobile and he has had it repainted a different color and had false license plates mounted, it might readily be concluded that he intended to keep it permanently from the possession of the owner.

QUESTION: A SOLDIER REPEATEDLY FINDS A PARTICULAR TRAINEE'S LOCKER UNSECURED. IN ORDER TO "TEACH THE TRAINEE A LESSON," THE SOLDIER REMOVES THE CONTENTS OF THE LOCKER BUT PLANS TO RETURN THE ITEMS AT A LATER DATE. IS THIS AN OFFENSE?

ANSWER: YES. DESPITE THE HONEST MOTIVE, THE SOLDIER'S INTENT ESTABLISHES THE OFFENSE OF WRONGFUL APPROPRIATION. IF THE ACCUSED WRONGFULLY TOOK PROPERTY AS A "JOKE" OR "TO TEACH THE OWNER A LESSON," THIS WOULD NOT BE A DEFENSE. IF THE ACCUSED INTENDED TO RETURN THE PROPERTY, HE WOULD BE GUILTY OF WRONGFUL APPROPRIATION, NOT LARCENY. IN THE CASE OF UNITED STATES V. McCOY, 17 CMR 246 (CMA 1954), THE ACCUSED SAW THAT ONE OF HIS ROOMMATES HAD LEFT A LOCKER UNSECURED. HE PICKED UP A WALLET FROM INSIDE THE LOCKER AND TOLD ANOTHER ROOMMATE THAT HE WANTED TO KEEP THE WALLET FOR ONE WEEK IN ORDER TO TEACH THE OWNER A LESSON. HE PUT THE WALLET ON A BOX IN A TRUCK AND HID THE MONEY FOUND INSIDE THE WALLET BEHIND SOME LOOSE BOARDS NEAR THE CEILING OF A NEARBY GYMNASIUM. IN SUCH A SITUATION, IF THE ACCUSED'S STORY IS BELIEVED, HE COULD BE FOUND GUILTY OF WRONGFUL APPROPRIATION AS SUCH A MOTIVE (I.E., TEACHING A LESSON) IS NOT A DEFENSE. THE ACCUSED WRONGFULLY WITHHELD PROPERTY FROM THE TRUE OWNER, AND THE OWNER LOST THE USE OF HIS PROPERTY. UNDER THESE CIRCUMSTANCES, THAT IS ALL THAT IS NECESSARY TO SUSTAIN A FINDING OF GUILTY TO A CHARGE OF WRONGFUL APPROPRIATION. SIMILARLY, AN ACCUSED COULD BE FOUND GUILTY OF A WRONGFUL APPROPRIATION OF GOVERNMENT PROPERTY AFTER TAKING 35 DETONATION FUSES, 100 TEAR GAS GRENADES, 100 GRENADES, AND 2 LIGHT ANTITANK WEAPONS FROM AN AMMUNITION STORAGE BUNKER ALL IN AN EFFORT TO "DEMONSTRATE THE LACK OF SECURITY AT THE DEPOT." UNITED STATES V. KASTNER, 17 MJ 11 (CMA 1983).

It is not a defense to larceny or wrongful appropriation that the accused merely took the property as a joke. This is true because the "joke" was the motive for the act, but the intent was to temporarily or permanently deprive someone of their property wrongfully. It is the intent element which establishes this as a criminal offense.

C. Robbery (Article 122, UCMJ). An accused will be convicted of robbery if he has the intent to steal and takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person

or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery.

In order for there to be a "taking in the presence of the victim," it is not necessary that the property taken be located within any certain distance of the victim. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room, and leaving the owner tied, go into that room and steal the valuables, they have committed robbery. Part IV, MCM 1984, para 47(c) (1). Presence for purposes of robbery means that the owner's possession or control is so imminent that force or intimidation is required to remove the property. United States v. Cagle, 12 MJ 736 (AFCMR 1982).

QUESTION: DURING THE INVESTIGATION OF AN ALLEGED ROBBERY, LAW ENFORCEMENT PERSONNEL INTERVIEW THE VICTIM, WHO MAINTAINS THAT ALTHOUGH HE HANDED OVER HIS WALLET BECAUSE A GUN WAS DRAWN ON HIM, HE WAS NOT AFRAID. IS THIS ROBBERY?

ANSWER: YES. IN THIS CASE, THE REQUISITE FORCE WAS PRESENTED BY THE GUN. UNDER A FORCE THEORY OF ROBBERY, FEAR IS NOT AN ESSENTIAL ELEMENT OF THE CRIME. THIS IS A SIGNIFICANT POINT BECAUSE SOME INDIVIDUALS ARE UNLIKELY TO ADMIT THAT THEY WERE FRIGHTENED.

QUESTION: A THIEF LIFTS A WALLET FROM THE POCKET OF A SLEEPING INDIVIDUAL WITHOUT WAKING HIM UP. THE THIEF THEN KICKS THE VICTIM. SINCE THERE IS A TAKING AND FORCE, IS THIS ROBBERY?

ANSWER: NO. FOR ROBBERY TO BE COMMITTED BY FORCE OR VIOLENCE, THERE MUST BE ACTUAL FORCE OR VIOLENCE TO THE PERSON, PRECEDING OR ACCOMPANYING THE TAKING AGAINST THE PERSON'S WILL. IN THIS CASE, FORCE WAS APPLIED AFTER THE TAKING WAS COMPLETE. THEREFORE, THIS IS LARCENY AND ASSAULT.

QUESTION: HOW MUCH FORCE IS REQUIRED FOR A ROBBERY?

ANSWER: ANY AMOUNT OF FORCE IS ENOUGH TO CONSTITUTE ROBBERY IF THE FORCE OVERCOMES THE ACTUAL RESISTANCE OF THE PERSON ROBBED, PUTS THE PERSON IN SUCH A POSITION THAT NO RESISTANCE IS MADE (E.G., HOLDING A GUN ON THE VICTIM), OR SUFFICES TO OVERCOME THE RESISTANCE OFFERED BY A CHAIN OR OTHER FASTENING BY WHICH THE ARTICLE IS ATTACHED TO THE PERSON. THE OFFENSE IS NOT ROBBERY IF AN ARTICLE IS MERELY SNATCHED FROM THE HAND OF ANOTHER OR A POCKET IS PICKED BY STEALTH, NO OTHER FORCE IS USED, AND THE OWNER IS NOT PUT IN FEAR. HOWEVER, IF RESISTANCE IS OVERCOME IN SNATCHING THE ARTICLE, THERE IS SUFFICIENT VIOLENCE, AS WHEN AN EARRING IS TORN FROM A PERSON'S EAR. THERE IS SUFFICIENT VIOLENCE WHEN A PERSON'S ATTENTION IS DIVERTED BY BEING JOSTLED BY AN ASSISTANT OF A PICKPOCKET WHO IS THUS ENABLED TO COMPLETE HIS CRIME. PART IV, MCM 1984, PARA 47(c) (2).

When a robbery is committed by putting a victim in fear, there need be no actual force or violence. However, there must be demonstration of force or threats by which the victim is in such fear that he is right in not resisting. The fear must be a reasonably well-founded one of present or future injury and the taking must occur while the fear exists. Part IV, MCM 1984, para

47(c) (3). Since robbery includes larceny as part of the offense, it is necessary that the item taken be of some value. Unlike other offenses of taking, however, the maximum penalty which may be adjudged is independent of the value of the item taken. This is because robbery is primarily a threat to the person rather than an offense against property.

D. Unlawful Entry (Article 134, UCMJ, para 111). This offense prohibits an unlawful entry into a building, structure, enclosure, or well marked area, real property, or such personal property as is usually used for habitation or storage. As with any offense charged under Article 134, the conduct of the accused must have been to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. The key to this offense is the lack of authority to enter, not the intent with which the entry is made.

Any entry is unlawful if it is made without the consent of any person authorized to consent to entry or without other lawful authority. U.S. v. Fayne, 26 MJ 528 (AFCMR 1988). No specific intent or breaking is required for this offense. Part IV, MCM 1984, para 111(c). Therefore, a perpetrator need not intend to commit any crime inside in order to be convicted of unlawful entry.

The areas covered by unlawful entry include a fenced storage area, United States v. Wickersham, 14 MJ 404 (CMA 1983), and a troop billeting tent. United States v. Love, 15 CMR 260 (CMA 1954). This crime is inapplicable to an automobile, United States v. Reese, 12 MJ 770 (ACMR 1981) as well as troop aircraft used as a conveyance. United States v. Taylor, 30 CMR 44 (CMA 1960).

E. Housebreaking (Article 130, UCMJ). The accused can be convicted of housebreaking if he unlawfully enters the building or structure of another with intent to commit a criminal offense therein.

The offense of housebreaking is broader than burglary in that the place entered is not required to be a dwelling. It is not necessary that the place be occupied and a breaking is not necessary. The entry may occur either during the daytime or at night. Part IV, MCM 1984, para 56(c) (1). The specific intent to commit some criminal offense inside is an essential element of housebreaking. This is a key difference between this crime and unlawful entry. If the accused commits a criminal offense after entering the building or structure, it may be inferred that he intended to commit that offense at the time of entry.

The term "building" includes a room, shop, store, office, or apartment. The term "structure" refers only to those enclosures which are in the nature of a building or a dwelling. Examples of these structures include a stateroom, hold, or other compartment of a vessel, an inhabitable trailer, an enclosed truck or freight car, a tent, and a houseboat. It is not necessary that the building or structure be in use at the time of the entry. Part IV, MCM 1984, para 56(Cc) (4).

F. Burglary (Article 129, UCMJ). The accused can be convicted of burglary if he unlawfully broke and entered the dwelling house of another in the nighttime with the intent to commit one of the offenses punishable under Articles 118 through 128, except Article 123a.

Offenses of breaking and entering include murder, manslaughter, rape and carnal knowledge, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, and assault. The accused must have the specific intent to commit one of these offenses at the time he breaks and enters the structure. Also, note some offenses under Article 134 involve assault with intent to commit various crimes. If that was the accused's intent, this element is satisfied.

QUESTION: SUPPOSE PVT BROWN IS TIRED, HE SEES A HOME, AND DECIDES TO ENTER AND REST. THEREAFTER, HE SEES SOME JEWELRY AND TAKES IT. IS THIS BURGLARY?

ANSWER: NO. HE HAS NOT COMMITTED BURGLARY EVEN THOUGH HE HAS COMMITTED ONE OF THE PRESCRIBED OFFENSES: LARCENY. HIS INTENT TO COMMIT THE LARCENY WAS FORMED AFTER THE UNLAWFUL BREAKING AND ENTRY. OF COURSE, PVT BROWN WILL MOST LIKELY HAVE SOME DIFFICULTY CONVINCING THE COURT OF THIS. AS WITH HOUSEBREAKING, THE COURT MAY INFER THAT THE ACCUSED HAD THE SPECIFIC INTENT TO COMMIT ANY OFFENSES HE ACTUALLY COMMITS ONCE INSIDE THE DWELLING.

Further, there must be a breaking, actual or constructive. An example of an actual breaking would be breaking the lock off a door. A constructive breaking would include gaining entry by trickery such as concealing one's self in a box or under false pretenses (gaining entry by misrepresenting one's self as a representative from the telephone or gas company).

QUESTION: IF THE HOMEOWNER LEAVES HIS FRONT DOOR WIDE OPEN AND SOMEONE ENTERS THROUGH THE DOORWAY AT NIGHT INTENDING TO COMMIT A CRIMINAL OFFENSE INSIDE, IS THIS BURGLARY?

ANSWER: NO. UNDER UCMJ, BURGLARY REQUIRES MORE THAN MERELY ENTERING A DWELLING. IF THE DOOR TO THE DWELLING IS WIDE OPEN, SO THAT THE CRIMINAL CAN WALK RIGHT IN WITHOUT MOVING ANY PART OF THE DOOR, THERE IS NO BREAKING. SIMILARLY, IF ENTRY IS GAINED THROUGH A WINDOW WHICH HAS BEEN LEFT OPEN WIDE ENOUGH TO PERMIT THE BURGLAR TO ENTER, THERE IS NO BREAKING. ON THE OTHER HAND, THE BREAKING REQUIRED BY THE STATUTE DOES NOT REQUIRE A BREAKING DOWN OF A WALL OR DOOR. IF A DOOR IS CLOSED BUT UNLOCKED, ALL THE CRIMINAL HAS TO DO IS OPEN IT TO CONSTITUTE A BREAKING. IF THE DOOR OR WINDOW IS PARTIALLY OPEN AND THE CRIMINAL MUST OPEN IT WIDER IN ORDER TO GET INSIDE, THEN THIS IS BREAKING. FINALLY, SHOVING ASIDE AN EXTENDED VENETIAN BLIND TO ENTER A DWELLING THROUGH AN OPEN, SCREENLESS WINDOW IS "BREAKING" UNDER ARTICLE 129, UCMJ, US V. THOMPSON, 32 MJ 65 (CMA 1991).

QUESTION: MUST AN ACCUSED PLACE HIS ENTIRE BODY INTO THE DWELLING BEFORE AN "ENTRY" OCCURS?

ANSWER: NO. ENTRY ALSO DOES NOT REQUIRE A COMPLETE ENTRY OF THE CRIMINAL'S BODY. IF ANY PART OF THE BODY, INCLUDING A FINGER, IS INSERTED INTO THE

DWELLING AFTER A BREAKING, THEN THERE IS AN ENTRY. THEREFORE, IF A WINDOW IS OPEN SIX INCHES, SO THAT THE CRIMINAL CANNOT CRAWL INSIDE THE HOUSE, IT IS AN ENTRY IF HE OPENS THE WINDOW FAR ENOUGH TO LEAN INSIDE AND GRAB A PURSE. IF HE ONLY INSERTS HIS ARM INTO THE WINDOW OPENING AND GRABS THE PURSE WITHOUT NEEDING TO OPEN THE WINDOW FURTHER, THERE IS AN ENTRY BUT NO BREAKING, SO NO BURGLARY.

Both the breaking and the entering must take place in the nighttime, which means that period between sunset and sunrise when there is not sufficient daylight to discern the features of a person's face. Part IV, MCM 1984, PARA 55 (c) (4).

Under this Article, the term dwelling house of another includes outbuildings within the common enclosure, farmyard, or cluster of buildings used as a residence. Normally, a store is not considered a dwelling unless it is part of a dwelling house or when the store is habitually slept in by family members or employees. The house must be used as a dwelling at the time of the breaking and entering. It is not necessary that anyone actually be in it at the time of the breaking or entering. However, if the house has never been occupied at all or has been abandoned, it is not a dwelling house. Separate dwellings within the same building, such as a barracks room, apartment, or a room in a hotel are "dwellings" for burglary.

QUESTION: CAN ANYTHING CONSTITUTE A DWELLING AS LONG AS SOMEBODY LIVES THERE?

ANSWER: NO. FOR EXAMPLE, A TENT IS NOT A DWELLING. PART IV, MCM 1984, PARA 55(c) (5).

To convict the accused of either housebreaking or burglary it is not necessary for him to commit a separate crime once inside. IF HE DOES, it is a separate crime for which he can be convicted and sentenced in addition to housebreaking or burglary as the case may be.

G. Arson (Article 126, UCMJ). The offense of arson is either aggravated or simple.

Aggravated arson can be committed on an inhabited dwelling or any other structure. To be convicted of aggravated arson of an inhabited dwelling, the accused must willfully and maliciously set on fire or burn an inhabited dwelling which belongs to a certain person and is of a certain value. An inhabited dwelling includes the outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not an inhabited dwelling, unless occupied as such, nor is a house that has never been occupied or which has been temporarily abandoned. An accused may be convicted of aggravated arson of his own inhabited dwelling whether he is the owner or tenant.

Also, the accused can be convicted of aggravated arson if he willfully and maliciously burns or sets on fire a certain structure which belonged to a certain person and which was of a certain value. Also, at the time there must be a human being in the building, and the accused must know there was a human

being in the building at the time. This "certain structure" includes one that is movable or immovable, such as a theater, church, boat, trailer, tent, auditorium, or any other public or private shelter or edifice when the accused knows there is a human being inside. The court may infer the accused knew a human being was inside the structure by the nature thereof. For example, if the accused sets a store, office, club, or theater on fire during normal business hours, the court may reasonably infer he knew there were human beings in that structure at the time. Part IV, MCM, 1984, para 52(c) (2).

For aggravated arson the inhabited dwelling or other structure must be burned or charred. Mere scorching or discoloration from heat is not sufficient to meet this element of damage to the dwelling or structure. Part IV, MCM, 1984, para 52(c) (2) (c).

Simple arson is the willful and malicious burning or setting on fire the property of another under circumstances not amounting to aggravated arson. The offense includes burning or setting fire to real or personal property of someone other than the offender.

QUESTION: HOW MUCH OF A "BURNING" IS REQUIRED TO CONSTITUTE AN ARSON?

ANSWER: ACTUAL BURNING OR CHARRING OF ALLEGED PROPERTY OR STRUCTURE IS REQUIRED. PART IV, MCM 1984, PARA 52(c) (2) (c). ARSON OF A STRUCTURE REQUIRES THAT THE STRUCTURE ITSELF BE BURNED OR CHARRED. THEREFORE, THE BURNING OF A DESK WITHIN A BUILDING IS NOT SUFFICIENT TO PROVE AGGRAVATED ARSON; RATHER, THIS DESCRIBES AN ATTEMPTED AGGRAVATED ARSON. UNITED STATES V. LITRELL, 46 CMR 628 (APR 1972).

PART F - DRUG OFFENSES (ARTICLE 112(a), UCMJ)

Wrongful Use, Possession, Etc., of Controlled Substances (Article 112(a), UCMJ).

The accused may be convicted of violating Article 112(a) if he wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a controlled substance. The prohibited controlled substances include opium, heroin, cocaine, amphetamine, LSD, methamphetamine, phencyclidine, barbituric acid, marijuana, and any compound or derivative of such substance. It also encompasses those drugs specified by the President as controlled drugs for purposes of this article and any substance listed in Schedules I through V of Section 202 of the Controlled Substances Act (21 USC 812).

This Article specifically prohibits seven different acts. Essentially, any wrongful dealing by a member of the armed services with illegal drugs is made punishable by a court-martial. "Wrongful" means conduct which is unauthorized and has no legal justification. This requirement of "wrongfulness" excuses the conduct of the military policeman who seizes drugs as part of an investigation and thereafter possesses them in the performance

of his duties. It also excuses the prosecutor and other court personnel who "possess" the drugs during the course of a trial. Similarly, certain of the drugs listed under this Article may be lawfully possessed pursuant to a valid prescription for medical treatment. This is true of many pain killers, which are opium derivatives. Part IV, MCM 1984, para 37(c) (5).

Section (b) (1) of Article 112(a) sets out specific drugs which are covered. This subsection lists all the more commonly used drugs found on military installations and, to cover the field, language is added to include "any compound or derivative of any" of those drugs to ensure that nothing was omitted; however, Congress also inserted subsection (b) (3), which prohibits dealings in any substance which is listed under the authority of the Controlled Substance Act. Recognizing the inventiveness of the soldier, Congress also allowed for an easy way to prohibit new, dangerous drugs, as they become available. When faced with such a situation, the President can publish a separate list of prohibited drugs, substances or any compound or derivative thereof.

A. Possession.

The term "possess" means to exercise control of something. Possession may be direct physical custody, such as holding an item in one's hand, or it may be constructive, as in the case of a person who hides an item in a locker or a car to which the person can return and retrieve the item.

Possession under the Article must be knowing and conscious. Part IV, MCM 1984, para 37(c) (2). In one case, the accused had not used a jacket since March and had loaned it to a friend in May. A minute amount of marijuana was discovered in a pocket in October. Under these facts, the court was not convinced beyond a reasonable doubt that the possession was knowing and conscious. U.S. v. Ludlum, 20 MJ 954 (AFCMR 1985). For example, if a soldier borrowed a friend's car and upon entering a military installation was searched. This search revealed a bag of marijuana under the car seat. In order to successfully prosecute this soldier for wrongful possession of marijuana, the government would have the burden of proving beyond a reasonable doubt that the soldier knew that the drugs were under the car seat.

The term "possession" by its very nature includes the power or authority to prevent control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item. Again, an accused may not be convicted of wrongful possession of a controlled substance if the accused did not know that the substance was present under his control. The accused's awareness of the presence of a controlled substance may be inferred from circumstantial evidence. Part IV, MCM 1984, para 37(c) (2).

The defense of innocent possession will apply if the accused briefly possesses the drugs in order to turn them over to the police. If his intent is to return the drugs to the owner, his purpose is unlawful, and he can be found guilty of possession. U.S. v. Kunkle, 23 MJ 213 (CMA 1987). In one case, the accused argued that he discovered illegal drugs in his SCUBA diving

bag. He possessed them a full day, however, which resulted in his conviction for possession. His retention of the drugs without making any effort to turn them over to the police rebutted his claim of innocent possession. U.S. V. Neely, 15 MJ 505 (AFCMR 1982).

B. Manufacture.

Under Article 112(a), manufacture means the production, preparation, propagation, compounding, or processing of a drug or other substance. This can be done either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis. Manufacture includes any packing or repackaging of such substance or labeling or relabeling of its container. The term "production" as used above includes the planting, cultivating, growing, or harvesting of a drug or other controlled substances.

C. Use.

Use means to inject, inhale, or otherwise to introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance is a required component of use. This knowledge may be inferred from the presence of the substance in the accused's body or other circumstantial evidence. The prosecution meets the burden of proof of the element of knowledge based on this permissive inference. Also, if the accused consciously tries to avoid knowledge of the presence of a controlled substance or the contraband nature of a controlled substance, the court may also infer this element of knowledge. Part IV, MCM, 1984, para 37c(10).

D. Introduction.

Wrongful introduction means to bring the drug onto or into a prohibited place. This can also be actual or constructive. That is, it is introduction for an individual to physically carry the drug onto an installation. It is also introduction for an individual to contrive to have another individual bring the drugs onto an installation. If a person wanted to bring drugs onto a military reservation, but did not want to risk being caught, he might hide the drugs under the seat of his car and then convince a friend to drive the vehicle onto the installation. The original individual will be criminally liable for a constructive wrongful introduction as he procured the commission of the offense even though the duped friend has no knowledge that the drugs are under the seat.

Introduction also includes sending controlled substances through postal channels. However, the government must prove that the accused is linked to the sending of the packages. U.S. V. Barber, 23 MJ 761 (NMCR 1986).

E. Distribution.

To distribute means to transfer possession of the drug from one person to another.

QUESTION: MUST A PERSON RECEIVE MONEY IN ORDER TO BE CONVICTED OF DISTRIBUTION?

ANSWER: NO. THERE IS NO REQUIREMENT FOR AN EXCHANGE OF MONEY OR ANYTHING OF VALUE. THE POSSESSION WHICH IS TRANSFERRED MAY BE EITHER ACTUAL OR CONSTRUCTIVE. IN OTHER WORDS, THE DRUGS MAY BE PHYSICALLY HANDED FROM ONE PERSON TO ANOTHER. ALSO, ONE PERSON MIGHT TELL A SECOND PERSON WHERE THE DRUGS ARE HIDDEN SO THAT THE SECOND PERSON CAN TAKE PHYSICAL POSSESSION OF THEM IN THE FUTURE. THIS SECOND EXAMPLE IS CONSTRUCTIVE DISTRIBUTION.

QUESTION: MUST ANY PARTICULAR AMOUNT OF DRUG BE TRANSFERRED BEFORE IT CAN BE CALLED A "DISTRIBUTION?"

ANSWER: NO. FOR EXAMPLE, SHARING A MARIJUANA JOINT IS DISTRIBUTION. UNITED STATES V. BRANCH, 483 F.2d 955 (9TH Cir. 1973). ALSO, SHARING OF COCAINE WITH FRIENDS IS A DISTRIBUTION EVEN WITHOUT A COMMERCIAL SCHEME. UNITED STATES V. RAMIREZ, 608 F.2d 1261 (9th Cir. 1979). THIS ALSO COVERS ONE COCONSPIRATOR WHO TRANSFERS DRUGS TO ANOTHER. U.S. V. TUERO, 26 MJ 106 (CMA 1988). UNDER THE CONSPIRACY ALL CONSPIRATORS CAN BE CONVICTED OF DISTRIBUTION BY ONE OF THE CONSPIRATORS.

In the case of United States v. Sorrell, 20 MJ 684 (ACMR, 1985), the Army Court of Military Review addressed the issue of whether a distribution of drugs can be said to have occurred when those receiving the drugs are unaware of their presence. This interesting question arose when the accused was involved in an automobile accident in Germany. At the time of the accident, the accused was driving a rented car which was loaded with a number of boxes containing his personal property. SFC Sorrell decided to move his belongings into the vehicles of two German nationals who stopped at the scene. They agreed to deliver the accused's possessions to his friend who would accept his belongings and safeguard them. Ultimately, the Germans delivered the accused's possessions to the local MP station. When the MP were unable to contact the accused's friend, they began to inventory the boxes and discovered a variety of controlled substances, smoking devices, marijuana residue, and drug paraphernalia. Investigation at the scene of the accident revealed a smoking device and marijuana seeds in the glove compartment of the accused's car. The controlled substances discovered during the inventory formed the basis of seven specifications alleging distribution of the various controlled substances. On appeal, the accused argued that he was wrongfully convicted for what was, in his view, a "temporary transfer of custody" of his personal property to the two passersby. He further argued that no distribution could have occurred as he did not intend to involve the two individuals in a drug operation. The court rejected this argument and affirmed his conviction for distribution. The court pointed out that the term "distribution" means delivery to the possession of another. Such a transfer would be wrongful if it was a knowing and conscious transfer on the part of the accused. It is immaterial whether or not the recipients knew there were drugs and paraphernalia in his belongings. United States v. Sorrell, 20 MJ 684 (ACMR 1985).

F. "With the Intent to Distribute."

Possession, manufacture, or introduction of any drug with the intent to distribute is a separate offense under Article 112(a). This offense carries a more severe penalty. This reflects the determination that drug dealers are truly dangerous individuals. These are specific intent crimes. The accused must have the specific intent to distribute the drugs. As with any other specific intent crime, intent may be proven by circumstantial evidence.

Some of the facts which might lead to a conclusion that the accused specifically intended to distribute the drug include the quantity of the substance (more than a person is likely to have for personal use) and the way it is packaged. For example, possession of five separated "baggies" of marijuana leads one toward the conclusion that the possessor's intent was to distribute than finding one bag containing the equivalent of five of the smaller bags. Note also, however, that a finding that the accused is addicted to drugs may tend to support the argument that a large quantity of drugs were kept for personal use. Also, possession of less than 30 grams of marijuana is subject to 2 years confinement. Possession of 30 grams or more is a 5 year offense. Therefore, an inference can be drawn that less than 30 grams of marijuana is for personal use. 30 grams or more, the court may infer possession with intent to distribute.

Aside from intent to distribute, a second aggravating circumstance which affects the maximum penalty involves the location of the offense. Any of these drug offenses committed while the accused is on duty as a guard, or on board a vessel, aircraft, or missile launch facility under control of the military, or while the accused is receiving combat pay, is punishable by five years confinement in addition to the punishment authorized for the basic offense.

G. Possession of Drug Paraphernalia.

This offense is charged under Article 92 as a violation of a general order or regulation. Most installations have promulgated local punitive regulations prohibiting drug paraphernalia. This offense is not covered under Article 112(a), UCMJ.

PART G - ECONOMIC CRIMES

These offenses, frequently called "white collar offenses," also require an understanding of their elements. The following are a few of the more common of these crimes.

A. Making a False and Fraudulent Claim (Article 132, UCMJ). A claim is a demand for a transfer of ownership or property.

QUESTION: WHO IS THE CLAIM AGAINST?

ANSWER: THE UNITED STATES. IT DOESN'T COVER CLAIMS AGAINST OFFICERS OF THE U.S. IN THE OFFICER'S PERSONAL CAPACITY.

1. The elements of this crime are as follows:

a. That the accused made a certain claim against the United States or an officer thereof;

b. That the claim was false or fraudulent in certain particulars; and

c. That the accused then knew that his claim was false or fraudulent in these particulars.

2. Any act placing the claim in official channels constitutes making a claim, even if that act does not amount to presenting a claim. It is not necessary that the claim be allowed or paid.

QUESTION: MUST THE ACCUSED KNOW IT IS FRAUDULENT?

ANSWER: YES. FALSE OR FRAUDULENT CLAIMS INCLUDE NOT ONLY THOSE CONTAINING SOME MATERIAL FALSE STATEMENT, BUT ALSO CLAIMS WHICH THE CLAIMANT KNOWS TO HAVE BEEN PAID OR FOR SOME OTHER REASON HE KNOWS HE IS NOT AUTHORIZED TO PRESENT OR UPON WHICH HE KNOWS HE HAS NO RIGHT TO COLLECT. PART IV, MCM, 1984, PARAGRAPH 58c(2) (a).

QUESTION: WHAT IF THE ACCUSED <u>BELIEVED</u> IT TO BE VALID?

ANSWER: THIS IS A DEFENSE TO THE CHARGE, I.E., MISTAKE. IT IS ALSO A DEFENSE THAT THE CLAIM WAS MADE NEGLIGENTLY.

B. <u>Presenting for Approval a False or Fraudulent Claim</u>.

1. This is different from the offense of making a false claim. The elements are:

a. The accused presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States or an officer thereof;

b. the claim was false or fraudulent in certain particulars; and

c. the accused knew the claim was false or fraudulent in these particulars.

2. The definition of false or fraudulent is the same as that in the discussion of making a false claim.

3. The claim must be presented, directly or indirectly, to some person having authority to pay it. The person to whom the claim is presented may be identified by position or authority to approve the claim, and need not be identified by name in the specification. A false claim may be tacitly presented, as when a person who knows that there is no entitlement to certain

pay accepts it nevertheless without disclosing a disqualification. In this case the accused would not have to make any representation of entitlement to the pay before he could be convicted of this offense. For example, PVT Ludlow cashed a pay check which included an amount for a dependency allowance. He knew at the time that he was not entitled to this allowance. When he cashed the check, he tacitly presented a false claim. Part IV, MCM, 1984, para 58c(2) (b).

C. Making or Using a False Writing or Other Paper in Connection with Claims (Article 132, UCMJ). The elements of this offense are:

1. That the accused made or used a certain writing or other paper;

2. That certain material statements in the writing or other paper were false or fraudulent;

3. That the accused then knew the statements were false or fraudulent; and

4. That the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

QUESTION: WHAT IS A "MATERIAL" STATEMENT?

ANSWER: THE MISSTATEMENT MUST HAVE A TENDENCY TO MISLEAD GOVERNMENT OFFICIALS IN THEIR CONSIDERATION OR INVESTIGATION OF THE CLAIM.

D. False Oath in Connection with Claims (Article 132, UCMJ). The elements here are:

1. That the accused made an oath to a certain fact or to a certain writing or other paper;

2. That the oath was false in certain particulars;

3. That the accused then knew it was false; and

4. That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

E. Forgery of Signature in Connection with Claims (Article 132, UCMJ). The elements here are:

1. That the accused used the forged or counterfeited the signature of a certain person or a certain writing or other paper; and

2. that the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

QUESTION: SHOULD THE INVESTIGATION OF THESE OFFENSES BE COORDINATED WITH JAG?

ANSWER: YES. THESE OFFENSES ARE COMPLEX. SOME OF THE ACCUSED ARE FAIRLY SOPHISTICATED. THE INVESTIGATION SHOULD BE CAREFULLY THOUGHT OUT AND ALWAYS COORDINATED WITH THE SERVICING PROSECUTOR.

QUESTION: WHAT SORT OF FALSE CLAIMS ARE MADE?

ANSWER: TDY TRAVEL AND DAMAGE TO HOUSEHOLD GOODS ARE TWO VERY COMMON CATEGORIES OF FRAUDULENT CLAIMS.

QUESTION: A SOLDIER CLAIMED SOME SILVERWARE WAS LOST IN A MOVE. HE FILED A CLAIM AND SUBMITTED A STATEMENT SUPPOSEDLY SIGNED BY HIS MOTHER, TO DOCUMENT THE LOSS. THE STATEMENT SAID SHE GAVE THE SILVERWARE TO HIM AS A WEDDING GIFT. WHEN SHE WAS QUESTIONED, HOWEVER, SHE STATED SHE HAD NEVER HEARD OF THE SILVERWARE. IS THIS A FALSE CLAIM CASE?

ANSWER: YES. U.S. V. WHITE, 17 MJ 953 (AFCMR 1984).

F. Investigative Guidelines. As we said earlier, some of these cases are complex. It is imperative that you work with JAG. In putting the case together, follow these basic rules:

1. Avoid Assumptions--Prove it. When putting together the proof, do not assume the elements--prove them. Avoid saying "I know that is true," or "of course that is true, everyone knows that," or "we can assume that." This may not be true. The judge may not share your outlook, or your assumptions. Do not rely on conclusions, rely on evidence and proof. Do not say "I now it's true because witness X told me so the other day." If that is what happened, get a statement from witness X. Make you own statement as to what witness X told you. In cases where you interview people over the telephone, write up MFRs or AIRs reflecting the substance of the conversation. The trial counsel will want statements and evidence on all of the elements. Two months later, at trial, the witness may "forget" ever having talked to you, or may contradict what you say, or may contradict what you say he said earlier. You may be the government's only evidence to substantiate what really happened. Do not just rely on your memory.

If you have a case involving illegal possession of a firearm, the prosecutor does not necessarily want to carry around two World War II submachine guns. Take pictures of them and write a statement describing them and their condition. Are they operable? Find out and say so. Do not assume they are. Are they even real? Find out and avoid some real embarrassment at trial. Check them out and write a brief MFR stating they are in good mechanical working order. The key is documenting what you do. Similarly, if your case involves a museum curator who has allegedly stolen some 100-year-old dresses, photograph them. Also, determine their value. Don't assume they're valuable just because they're old. Remember, don't assume--prove your case.

2. Document Everything.

QUESTION: WHAT IF YOU INTERVIEW A WITNESS WHO SWEARS HE KNOWS NOTHING?

ANSWER: THIS CAN BE JUST AS IMPORTANT AS ONE WHO DOES KNOW SOMETHING. GET HIS STATEMENT, SAYING HE KNOWS NOTHING. TWO MONTHS LATER HE MAY SHOW UP IN COURT AS A WITNESS FOR THE OTHER SIDE, CLAIMING TO KNOW A GREAT DEAL ABOUT THE CASE. IF THIS HAPPENS, THE PROSECUTOR WILL HAVE TO BE ABLE TO IMPEACH HIM. THE STATEMENT YOU TOOK EARLIER WILL DO JUST THAT. AGAIN, DO NOT RELY ON MEMORY. GET IT IN WRITING.

QUESTION: WHY ELSE IS IT IMPORTANT FOR YOU TO DOCUMENT EVERYTHING?

ANSWER: ANOTHER REASON FOR CAREFULLY DOCUMENTING EVERYTHING IS THAT THE INVESTIGATION MAY GO ON OVER SEVERAL MONTHS. YOU MAY HAVE TO TURN IT OVER TO ANOTHER INVESTIGATOR. THE NEW AGENT WILL NEED TO KNOW WHAT YOU DID AND WHY. WHAT WERE YOU GOING AFTER? WHERE WERE YOU HEADING? WHAT WAS YOUR PLAN OF ATTACK? WHAT DID YOU DO? WHAT REMAINS TO BE DONE? DO NOT JUST TURN OVER BOXES OF DOCUMENTS TO HIM. THERE IS NO NEED FOR HIM/HER TO REDO WHAT YOU ALREADY HAVE DONE. LET HIM KNOW JUST WHERE YOU WERE GOING, WHERE YOU HAVE BEEN, AND WHY YOU WENT THERE. OTHERWISE, ALL OF YOUR EFFORTS MAY GO TO WASTE.

3. Don't Underestimate the Case. If we are dealing with a false claim, you need to understand the claims process. Approaching a case of contract fraud without an understanding of the procurement system is not likely to produce any success. Therefore, discuss the "system" with a knowledgeable expert who will guide you through the process and give you a better understanding of that system.

4. Don't Underestimate the Suspect. Remember the nature of the case and the level of intelligence and sophistication of the witness. Interviews can easily produce misleading information and clever interviewees can create exculpatory information. The suspect may have a PhD and may be an expert in computer science, American history, etc. Do not hesitate to bring agency personnel into the investigation. They can, of course, pinpoint areas of suspicious activity upon which you will focus your investigation.

5. Coordinate with JAG. Understand that you have to sell the case to JAG. You may have lived with the case for quite some time, and may be very familiar with all of its intricacies. The trial counsel, however, may know nothing of it until you walk into his office. He will not know the background of what led to the investigation or what you have discovered. You, therefore, need to package the case for him also. You need to put the investigative effort into a format that makes sense. Remember that YOU are the expert investigator. A sloppy product will most probably result in equally inferior results.

QUESTION: SHOULD YOU COORDINATE THE CASE WITH JAG AT A VERY EARLY STAGE?

ANSWER: YES. IN A COMPLEX INVESTIGATION, YOU SHOULD SCHEDULE PERIODIC BRIEFINGS. YOU BOTH SHOULD BE THINKING ALONG THE SAME LINES. DO NOT WAIT UNTIL THE INVESTIGATION IS OVER BEFORE YOU CONTACT THE PROSECUTOR FOR THE FIRST TIME. ONCE YOU HAVE A BASIC OUTLINE OR THEORY OF THE CASE, DISCUSS IT

WITH THE PROSECUTOR. GET THE THOUGHTS OF THE TRIAL COUNSEL. HE MAY SEE SOMETHING YOU TOTALLY OVERLOOKED. TOGETHER, YOU STAND A FAR GREATER CHANCE OF SUCCESS. AT THE LEAST, YOU NEED TO BRIEF HIM ON THE ALLEGATIONS INVOLVED, THE APPARENT OFFENSES THAT YOU SEE, AND HOW YOU INTEND TO PROCEED WITH THE INVESTIGATION. THIS CAN SAVE YOU A LOT OF TIME AND WASTED EFFORT. THE PROSECUTOR MAY SEE POSSIBLE INCONSISTENCIES IN THE EVIDENCE OR POTENTIAL AFFIRMATIVE DEFENSES THAT THE SUSPECT MAY RAISE. IF SO, ADDITIONAL AREAS MAY NEED TO BE INVESTIGATED. HE CAN HELP TO ANTICIPATE THE SUSPECT'S DEFENSES, SO YOU CAN CLOSE ANY POTENTIAL LOOPHOLES IN THE CASE. THIS IS IMPORTANT BEFORE YOU PROCEED TO INTERROGATE THE SUSPECT. THE PROSECUTOR MAY HELP PREDICT HOW THE SUSPECT WILL ATTEMPT TO WIGGLE OFF THE HOOK. HE MAY WANT OTHER AVENUES EXPLORED AND MAY SEE THE NEED FOR ADDITIONAL EVIDENCE.

It is absolutely essential for you to work with the prosecutor. He is going to have to take the case into court and win with it. If he wants more witness interviews, conduct them. Do not delay and ignore him. A poor relationship between the two of you will prove disastrous for everyone, but the accused.

Coordination with the prosecutor does not simply mean that you walk into his office one afternoon and drop 15 volumes of documents on his desk, asking him to determine if any crimes were committed. He does not have two weeks to try to reinvent the wheel by redoing all that you already have done. You need to sit down and discuss the case with him. This may take some time, but it will be time well spent. In some cases, you and the prosecutor may spend entire weeks, even months, working together on a case. Simply dropping the volumes on his desk is likely to accomplish little. It will probably produce a negative reaction against you. He may feel that if you are too busy to bother discussing the case with him, then HE is too busy to waste time reading the documents. The result may be that nothing is accomplished. He may give the case a superficial examination but, without the background and analysis that you could provide, he may not see what you see. The suspect may be dramatically undercharged and may escape with an incredibly favorable pretrial agreement. He may not even be prosecuted at all.

6. Seriousness of the Offenses.

QUESTION: HOW SERIOUS ARE THESE OFFENSES CONSIDERED?

ANSWER: THE ARMY'S POLICY TOWARD COMBATING ECONOMIC CRIME IS CONTAINED IN AR 690-700. PARAGRAPH 2-1 STATES: "IT IS ESSENTIAL THAT STRONG AND EFFECTIVE MEASURES BE APPLIED, CONSISTENT WITH APPLICABLE LAW AND REGULATION, TO THOSE INDIVIDUALS WHO ARE FOUND TO HAVE ENGAGED IN THE THEFT, FRAUD, OR OTHER INTENTIONALLY DISHONEST CONDUCT AGAINST THE ARMY...SERVICE MEMBERS WHO ENGAGE IN THIS TYPE OF MISCONDUCT ARE ALREADY SUBJECT TO PUNISHMENT UNDER APPLICABLE PROVISIONS OF THE UNIFORM CODE OF MILITARY JUSTICE AND TO ADVERSE PERSONNEL ACTIONS...IT IS THE POLICY OF THE ARMY THAT ANY CIVILIAN EMPLOYEE FOUND TO HAVE ENGAGED IN THEFT, FRAUD, OR OTHER INTENTIONALLY DISHONEST CONDUCT AGAINST THE ARMY WILL BE CONSIDERED FOR REMOVAL FROM THE FEDERAL SERVICE. ANY LESSER PENALTY WILL REQUIRE JUSTIFIABLE MITIGATING CIRCUMSTANCES."

QUESTION: SOME PEOPLE CALL THIS CRIME "VICTIMLESS." IS IT?

ANSWER: ECONOMIC CRIME IS CORRUPTION. IT CARRIES WITH IT A PRICE FAR HIGHER THAN ANYTHING WE CAN MEASURE IN DOLLARS AND CENTS. IT IS A BREEDING GROUND FOR CYNICISM AND DISTRUST. THE AMERICAN PUBLIC READS OF THE WASTE AND FRAUD, AND PEOPLE START TO THINK THAT ALL GOVERNMENT EMPLOYEES ARE CROOKS, ALL OF THEM STEAL, AND ALL ARE INHERENTLY DISHONEST. THEY COME TO DOUBT THE HONESTY AND INTEGRITY OF ALL GOVERNMENT EMPLOYEES, INCLUDING ME AND INCLUDING YOU. IN THIS SENSE, ECONOMIC CRIME IS A CRIME AGAINST OUR ENTIRE SYSTEM. IT IS NOT, THEREFORE, A "VICTIMLESS" CRIME. YOU ARE THE VICTIM, AS IS EVERY OTHER HONEST, HARD-WORKING GOVERNMENT EMPLOYEE. WE ARE ALL ITS VICTIMS. IT DESTROYS PUBLIC CONFIDENCE IN OUR GOVERNMENT, AND IN US.

PART H - CRIMINAL LIABILITY (THE GENERAL PUNITIVE ARTICLES)

A. Principals (Article 77, UCMJ). Article 77 provides that any person who commits an offense punishable by the UCMJ, or aids, abets, counsels, commands, procures, or causes the commission of an offense punishable by the UCMJ is a principal. A principal is one who is equally guilty as one who commits the offense directly and may be punished to the same extent.

1. Who may be liable for an offense?

a. The perpetrator is one who commits the offense either by his own hand or by causing an offense to be committed by knowledge or intentionally setting in motion acts which result in commission of the offense.

2. Aider and Abettor. If one is not a perpetrator, in order to be guilty of an offense committed by the perpetrator, the accused must:

a. Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and

b. Share in the criminal purpose or design. Part IV, MCM, 1984, para 1(b) (2) (b) .

QUESTION: CAN ONE BE A PRINCIPAL TO A CRIME WHEN HE IS NOT EVEN PRESENT AT THE SCENE OF THE CRIME?

ANSWER: YES. PRESENCE AT THE SCENE OF THE CRIME IS NOT NECESSARY TO MAKE ONE A PARTY TO THE CRIME AND LIABLE AS A PRINCIPAL. PART IV, MCM 1984, PARA 1(b) (3) (a). IF ONE KNOWS THAT A PERSON INTENDS TO SHOOT ANOTHER AND PROVIDES THE PERPETRATOR WITH A PISTOL, INTENDING THAT THE ASSAULT BE CARRIED OUT, THAT PERSON WILL BE JUST AS GUILTY OF THE ASSAULT AS THE ACTUAL PERPETRATOR, EVEN THOUGH NOT PRESENT AT THE SCENE OF THE ASSAULT. AT THE SAME TIME, MERE PRESENCE AT THE SCENE OF THE CRIME IS NOT ENOUGH TO TRIGGER LIABILITY AS A PRINCIPAL. IN OTHER WORDS, SOME PARTICULAR PARTICIPATION OR SHOW OF ENCOURAGEMENT IN THE COMMISSION OF THE OFFENSE IS NECESSARY BEFORE ANY

CRIMINAL LIABILITY AS A PRINCIPAL RESULTS. MERE INACTIVE PRESENCE AT THE SCENE OF THE CRIME DOES NOT ESTABLISH GUILT AS A PRINCIPAL.

QUESTION: WHAT ARE EXAMPLES OF AN AIDER AND ABETTER AT THE SCENE?

ANSWER: A GETAWAY DRIVER OR LOOK-OUT. IN ORDER TO SECURE A CONVICTION FOR AIDING AND ABETTING, THE EVIDENCE MUST SHOW SOME AFFIRMATIVE PARTICIPATION WHICH AT LEAST ENCOURAGED THE PERPETRATOR TO COMMIT THE OFFENSE, OR THAT THERE BE EVIDENCE OF A CONCERT OF PURPOSE OR THE AIDING OR ENCOURAGING OF THE COMMISSION OF THE CRIMINAL ACT AND A CONSCIOUS SHARING OF THE CRIMINAL INTENT. U.S. V. EPPS, 20 MJ 504 (ACMR 1985).

QUESTION: WHAT PURPOSE IS SERVED BY HAVING THE THEORY OF PRINCIPALS?

ANSWER: ITS PURPOSE IS TO MAKE CLEAR THAT A PERSON DOES NOT HAVE TO PERSONALLY COMMIT THE ACTS NECESSARY TO CONSTITUTE AN OFFENSE IN ORDER TO BE GUILTY OF IT. IN OTHER WORDS, THE LAW OF PRINCIPALS PUTS IN PLACE A MECHANISM TO DISCOURAGE THOSE WHO INSTIGATE CRIME AND EXPECT TO ESCAPE CRIMINAL LIABILITY SIMPLY BECAUSE SOMEONE ELSE DID THE CRIMINAL ACT.

QUESTION: IS SOMEONE CHARGED WITH A VIOLATION OF ARTICLE 77?

ANSWER: NO. A PRINCIPAL IN A LARCENY, FOR EXAMPLE, WOULD NOT BE CHARGED WITH A VIOLATION OF ARTICLE 77; RATHER, HE WOULD BE CHARGED WITH A VIOLATION OF ARTICLE 121 (LARCENY) JUST AS THE ACTUAL PERPETRATOR.

QUESTION: WHAT TYPES OF PEOPLE QUALIFY AS PRINCIPALS?

ANSWER: INDIVIDUALS WHO COULD BE HELD LIABLE AS PRINCIPALS INCLUDE THE PERPETRATOR OF THE CRIME. A PERPETRATOR IS AN INDIVIDUAL WHO ACTUALLY COMMITS THE OFFENSE. A PERSON IS ALSO LIABLE AS A PRINCIPAL IF HE AIDS, ABETS, COUNSELS, COMMANDS, OR PROCURES SOMEONE ELSE TO COMMIT THE CRIME. THUS, THE PERSON WHO ENCOURAGES ANOTHER INDIVIDUAL TO HIT A THIRD PERSON IS GUILTY OF THE ASSAULT, IF IT IS CARRIED OUT AS THE RESULT OF HIS URGING.

3. Criminal Liability of the Principal. Once guilt as a principal is established, a principal is liable not only for the offenses that he helped to commit, but he is also liable for any offense which any other principal commits which is a natural and probable consequence of the original intended offense.

QUESTION: IF AN INDIVIDUAL ACTIVELY ASSISTS IN AN ARMED ROBBERY OR BURGLARY, AND THE VICTIM IS KILLED BY ONE OF THE ACCUSED'S CO-CONSPIRATORS, CAN THE ACCUSED BE CONVICTED OF MURDER ON A PRINCIPAL THEORY EVEN IF HE HAD NO INTENT TO KILL OR TO ACTIVELY PARTICIPATE IN A HOMICIDE?

ANSWER: YES. SUCH CRIMES BY THEIR VERY NATURE ARE LIKELY TO LEAD TO MURDER. MCM 1984, ARTICLE 77, PARA b(5).

B. Accessory After the Fact (Article 78, UCMJ).

An accessory after the fact is a person who, knowing that an offense punishable by the UCMJ has been committed, receives, comforts, or assists, the offender in order to hinder or prevent his apprehension, trial, or punishment. Silence does not make one an accessory after the fact. The accessory after the fact must actively assist the offender. This assistance is not limited to the goal of hiding the offender or effecting his escape, but it includes acts which are performed in order to conceal the commission of an offense. Part IV, MCM 1984, Article 78, para b(1) to (4).

QUESTION: WHAT IS THE DIFFERENCE BETWEEN A PRINCIPAL AND AN ACCESSORY AFTER THE FACT?

ANSWER: A PRINCIPAL ASSISTS OR ENCOURAGES THE PERPETRATOR IN THE COMMISSION OF THE CRIME. THE OFFENSE OF ACCESSORY AFTER THE FACT OCCURS AFTER THE COMMISSION OF THE CRIME. INSTEAD OF BEING FOUND GUILTY OF THE OFFENSE AS A PRINCIPAL, THE ACCESSORY AFTER THE FACT HAS COMMITTED A SEPARATE VIOLATION THROUGH HIS OBSTRUCTION OF JUSTICE. ONE EXAMPLE OF AN ACCESSORY AFTER THE FACT WOULD BE THE INDIVIDUAL WHO WAS NOT A PARTY TO AN ORIGINAL LARCENY SCHEME BUT WHO, AFTER THE THEFT, REMOVES THE STOLEN GOODS FROM THEIR HIDDEN LOCATION IN ORDER TO HELP THE PERPETRATOR EVADE PROSECUTION. UNITED STATES V. GREENER, 1 MJ 11 (NCMR 1977). IT WOULD BE A DEFENSE TO A CHARGE OF ACCESSORY AFTER THE FACT IS LACK OF KNOWLEDGE REGARDING THE COMMISSION OF A CRIME OR LACK OF INTENT TO ASSIST THE PERPETRATOR ESCAPE LIABILITY.

C. Attempts (Article 80).

There are strong public policy grounds for punishing the individual who tries to commit a crime and, for some reason, fails. If one soldier fires his weapon toward his bunkmate with the intent to kill him and the sole reason for his failure is that he is a poor shot, it is obvious that the perpetrator is a dangerous individual who should be removed from society. In this case, punishing the perpetrator will hopefully prevent him from trying to kill his bunkmate again or turning his aggression against someone else.

The law of attempts also gives law enforcement personnel the power to stop the commission of a crime before people are injured and property is destroyed. If attempts were not punishable, the police would have to stand by and watch crimes in progress knowing they could do nothing until the crime was completed.

Article 80, UCMJ, defines an attempt as "an act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission..." Its elements, then, are as follows:

1. Act. To constitute an attempt, there must be a specific intent to commit a particular offense. Both the UCMJ and the Manual for Courts-Martial (MCM) require that the specific intent to commit the offense be accompanied by an act. The primary difficulty encountered in the law of attempts is in

determining the exact nature of the necessary act. Article 80 describes the act as one which goes beyond preparatory steps, is a direct movement toward the commission of the offense, and need not be the last act essential to the consummation of the offense. Part IV, MCM, 1984, Article 80, para c(2). This question is one of fact which must be determined in each case.

In United States v. Sampson, 7 MJ 513 (ACMR 1979), the acts of breaking and entering the victim's quarters while nude, approaching the nude female occupant, and reaching in the direction of the victim's neck and shoulder were held to be sufficient acts for attempted rape.

In U.S. v. St. Fort, 26 MJ 764 (ACMR 1988), a husband "returned home unexpectedly one night to discover his wife clad only in a bathrobe and appellant hiding naked in a closet. The appellant fled into the street." The court held that he "intended to engage in sexual intercourse with a woman not his wife and that he had taken substantial steps beyond mere preparation towards accomplishing this offense." He was, then, guilty of attempted adultery.

The basic difficulty in determining whether there has been an attempted crime is determining whether there has been an act sufficient to satisfy the MCM requirement that the act needs to go beyond "mere preparation." Therefore, it is necessary to examine this point more closely.

QUESTION: WHAT IS "MERE PREPARATION?"

ANSWER: IT "CONSISTS OF DEVISING OR ARRANGING THE MEANS OR MEASURES NECESSARY FOR THE COMMISSION OF THE OFFENSE." PART IV, MCM 1984, PARA 4(c) (2). THE PURPOSE OF THIS REQUIREMENT OF AN ACT BEYOND MERE PREPARATION IS SO THAT THERE IS NO QUESTION THAT THE INDIVIDUAL, IN FACT, INTENDED TO CARRY OUT THE ATTEMPTED CRIME. WITH THIS IN MIND, THE ACT SHOULD BE ONE WHICH CLEARLY SHOWS THE PERPETRATOR'S INTENT TO COMMIT THE CRIME, BUT IT NEED NOT BE THE LAST ACT PRIOR TO THE SUCCESSFUL COMMISSION OF THE PLANNED OFFENSE. THAT IS, THE INDIVIDUAL NEED NOT PULL THE TRIGGER IN ORDER TO BE GUILTY OF ATTEMPTED MURDER. HE CAN BE GUILTY BY POINTING A LOADED PISTOL WITH THE REQUISITE INTENT.

QUESTION: WE RECEIVE AN INFORMANT'S TIP THAT SPC TORCH PLANS TO BURN DOWN THE PX. THE MP FOLLOW TORCH TO A GROCERY STORE WHERE HE BUYS A PACK OF MATCHES. CAN WE APPREHEND SPC TORCH FOR ATTEMPTED ARSON?

ANSWER: NO. THIS IS MERE PREPARATION.

QUESTION: SPC TORCH WALKS UP TO THE PX AND TOUCHES A BURNING MATCH TO THE CORNER OF THE STRUCTURE. IS THIS AN ATTEMPTED ARSON?

ANSWER: YES. SPC TORCH HAS GONE BEYOND MERE PREPARATION EVEN IF NO FIRE RESULTS.

QUESTION: CAN ONE BE CONVICTED OF AN ATTEMPT EVEN THOUGH IT WAS PHYSICALLY IMPOSSIBLE FOR THE CRIME TO BE COMMITTED? FOR EXAMPLE, THE ACCUSED POINTS A

GUN AT THE VICTIM AND DELIBERATELY PULLS THE TRIGGER. THE ACCUSED DID NOT KNOW THE GUN HAD NO FIRING PIN AND WOULD NOT FIRE. IS THIS AN ATTEMPT?

ANSWER: YES. THE PERPETRATOR INTENDED TO COMMIT THE CRIME WITH A WEAPON HE BELIEVED WOULD FIRE AND WENT BEYOND MERE PREPARATION. AN ATTEMPT IS A FRUSTRATED EFFORT TO COMMIT A CRIME WHICH TENDS, EVEN THOUGH FAILING, TO EFFECT ITS COMMISSION. U.S. V. POWELL, 24 MJ 603 (AFCMR 1987).

QUESTION: SUPPOSE THE ACCUSED CONSCIOUSLY AND INTENTIONALLY POSSESSED A SUBSTANCE HE BELIEVED TO BE LSD, BUT IT WAS NOT. HAS HE COMMITTED A CRIME?

ANSWER: ATTEMPTED POSSESSION OF LSD. U.S. V. LAFONTANT, 16 MJ 236 (CMA 1983).

QUESTION: WHAT IF HE USES IT, THINKING IT IS LSD?

ANSWER: THE CRIME IS ATTEMPTED USE. THIS CRIME IS NOT DEPENDENT UPON WHETHER OR NOT THE SUBSTANCE REALLY IS LSD; RATHER, IT DEPENDS UPON WHETHER HE "BELIEVED THE SUBSTANCE HE CONSUMED WAS LSD." U.S. V. HENDERSON, 20 MJ 87 (CMA 1985).

QUESTION: WHAT IF HE SELLS THE SUBSTANCE, BELIEVING IT TO BE LSD?

ANSWER: THE CRIME IS ATTEMPTED DISTRIBUTION. U.S. V. JACKSON, 12 MJ 905 (NMCMR, 1982). IT IS HIS INTENT TO TRANSFER WHICH IS IMPORTANT, EVEN IF THE SUBSTANCE TURNS OUT TO BE DIET PILLS. U.S. V. NEWAK, 15 MJ 541 (AFCMR 1982). IN OTHER WORDS, DID THE ACCUSED BELIEVE HE WAS DISTRIBUTING LSD? U.S. V. MADLEY, 14 MJ 651 (ACMR 1982).

QUESTION: WHAT IF THE ACCUSED SELLS A SUBSTANCE WHICH HE CLAIMS TO BE HEROIN, BUT KNOWS IT IS ONLY SUGAR?

ANSWER: THERE IS NO INTENT TO COMMIT THE DISTRIBUTION OF HEROIN. SO, THERE IS NO ATTEMPT HERE. U.S. V. COLLIER, 3 MJ 932 (ACMR 1977).

QUESTION: WHAT CRIME IS THIS?

ANSWER: LARCENY BY FRAUD OF THE MONEY PAID FOR THE HEROIN WHICH TURNS OUT TO BE SUGAR U.S. V. ASKEW, 23 MJ 818 (NMCMR 1986).

QUESTION: WHAT IF A PERSON REACHES INTO SOMEONE'S POCKET OR A CASH DRAWER IN ORDER TO STEAL MONEY. HOWEVER, THE POCKET OR DRAWER TURNS OUT TO BE EMPTY? IS THIS A CRIME?

ANSWER: YES. THIS IS ATTEMPTED LARCENY. THE MERE FACT THAT THE CRIMINAL EFFORT IS DESTINED TO FAIL BECAUSE OF SOME REASON UNKNOWN TO THE PERPETRATOR AT THE TIME DOES NOT PREVENT A FINDING OF CRIMINAL LIABILITY FOR ATTEMPT.

In the case of United States v. Thomas, 32 CMR 278 (CMA 1962) the accused and two of his companions committed sexual intercourse with a female, whom they believed to be unconscious, under circumstances amounting to rape. In

actuality, the female was dead at the time the intercourse was committed. On appeal, the accused's conviction for attempted rape was affirmed on the principle that although a dead person cannot be raped, the accused intended to commit an act which amounted to rape, and the accused also performed an overt act toward the crime's commission. Finally, the court concluded that this was an attempted rape because had the facts been as the accused believed them to be (that the female was alive) he could have been convicted of rape.

Another example of the issue of factual impossibility arises when the accused sees an unconscious acquaintance with a hypodermic needle and syringe lying at his side and proceeds to destroy the needle and syringe in an effort to prevent the acquaintance from being prosecuted for use and possession of narcotics, not knowing that the acquaintance is, in fact, dead. In such a case, although the accused cannot be found guilty of accessory after the fact in violation of Article 78, UCMJ, he may be found guilty of attempted accessory after the fact because the accused believed that the individual was alive at the time the needle and syringe were destroyed. United States v. Wilson, 7 MJ 997 (ACMR 1979).

The policy behind convicting an accused in situations of factual impossibility is the accused has demonstrated that he is a dangerous person whose intent is just as criminal as it would have been had the facts been as he believed them to be.

2. Specific Intent. Attempts are specific intent crimes. The accused is only liable for an attempt if he specifically intended to commit the crime.

D. Conspiracy (Article 81, UCMJ). A conspiracy occurs when there is an agreement between two or more persons to commit an offense under the UCMJ and while the agreement remained in effect and the accused was a party to the agreement one or more of the coconspirators performs an overt act in furtherance of the agreement.

There are two primary social purposes served through enforcement of the crime of conspiracy. First, since a conspiracy can be proven even where no substantive crime has been committed, criminal conduct can be stopped before the criminal harm occurs. Secondly, group activity of a criminal nature is more dangerous to society than the criminal conduct of one individual who is working alone.

1. The Agreement. The agreement in a conspiracy does not have to be in any particular form and it does not have to be manifested by any formal words. It is sufficient if the minds of the parties arrive at a common understanding to commit a crime. The agreement does not have to specifically state the way the conspiracy will be accomplished or what part each conspirator is to play. Part IV, MCM, 1984, para 5c(2).

QUESTION: IF AN UNDERCOVER DRUG SUPPRESSION TEAM (DST) MEMBER SETS UP A DRUG "BUY" WITH A SUSPECTED DEALER, HAS THE DST MEMBER JUST BECOME A CONSPIRATOR?

ANSWER: NO. IT IS IMPORTANT TO UNDERSTAND THAT WHEN TWO INDIVIDUALS ENTER INTO AN AGREEMENT TO COMMIT A CRIME RECOGNIZED BY THE UCMJ, BOTH INDIVIDUALS MUST HAVE CRIMINAL INTENT BEFORE A CONSPIRACY EXISTS. THIS ISSUE WILL ARISE WHEN AN UNDERCOVER LAW ENFORCEMENT OFFICER APPROACHES A SUSPECTED DRUG DEALER AND PROPOSES TO PURCHASE A CONTROLLED SUBSTANCE. IN THIS SITUATION, NO CONSPIRACY WILL EXIST, AS THE LAW ENFORCEMENT OFFICER IS ACTING IN THE PERFORMANCE OF HIS DUTIES AND DOES NOT POSSESS CRIMINAL INTENT. UNITED STATES V. WEST, 13 MJ 800, 802 (ACMR 1982).

2. Overt Act. Besides the agreement, an overt act done by one or more of the conspirators at the time of or following the agreement is necessary to complete the offense. U.S. v. Johnson, 25 MJ 8789 (NMCMR 1988). Unlike an attempt, the overt act necessary to complete a conspiracy does not have to be beyond mere preparation.

QUESTION: IF THREE INDIVIDUALS PLAN TO ROB THE BANK ON POST AND ONE OF THEM GOES TO A PAWN SHOP AND BUYS A GUN TO USE, AND ANOTHER GOES TO A DEPARTMENT STORE AND BUYS SOME HALLOWEEN MASKS TO WEAR DURING THE OFFENSE, HAS A CONSPIRACY OCCURRED?

ANSWER: YES. EITHER THE PURCHASE OF THE GUN OR THE PURCHASE OF THE MASKS WOULD BE SUFFICIENT OVERT ACTS FOR A CONSPIRACY. EVEN THOUGH THE PURCHASE OF THESE ITEMS IS "MERE PREPARATION" FOR THE ROBBERY, "MERE PREPARATION" IS ENOUGH OF AN OVERT ACT TO CONSTITUTE A CONSPIRACY.

QUESTION: HAS AN ATTEMPTED ROBBERY OCCURRED?

ANSWER: NO. MERE PREPARATION IS ENOUGH FOR A CONSPIRACY. IT IS NOT SUFFICIENT FOR AN ATTEMPTED ROBBERY.

The overt act itself does not have to be illegal, but it does have to be a manifestation that the agreement is being executed. Any overt act is enough, no matter how preliminary or preparatory in nature as long as it demonstrates that the agreement is being set into motion. An example would be purchasing a crowbar with which to break and enter a store. Such an act would be a sufficient overt act to sustain a conviction of conspiracy to commit larceny. United States v. Choat, 21 CMR 313 (CMA 1956).

3. Criminal Liability.

QUESTION: TEN INDIVIDUALS PLAN TO COMMIT A CRIME WHILE POSING AS MILITARY POLICE. THAT NIGHT WHILE 9 OF THE INDIVIDUALS ARE SLEEPING, ONE GOES OUT TO A STORAGE ROOM AND STEALS 10 MP ARMBANDS TO BE USED DURING THE CRIME. IS THE OFFENSE OF CONSPIRACY COMPLETE?

ANSWER: YES. BY SECURING THESE ARMBANDS WHICH IS AN OVERT ACT IN FURTHERANCE OF THE AGREEMENT, THE OFFENSE OF CONSPIRACY IS COMPLETE.

QUESTION: ARE THE NINE SLEEPING INDIVIDUALS CRIMINALLY LIABLE FOR CONSPIRACY?

ANSWER: YES. BY SECURING THESE ARMBANDS (OVERT ACT), THIS ONE INDIVIDUAL HAS COMPLETED THE OFFENSE OF CONSPIRACY. THE NINE SLEEPING COCONSPIRATORS ARE LIABLE FOR CONSPIRACY TO COMMIT LARCENY. ADDITIONALLY, HE HAS ALSO MANAGED TO MAKE THE NINE CRIMINALLY LIABLE FOR THE LARCENY OF THE ARMBANDS. THIS LIABILITY WILL EXIST EVEN THOUGH THE OTHER COCONSPIRATORS WERE UNAWARE OF HIS ACTIONS. AN OVERT ACT DONE BY ONE CONSPIRATOR IN FURTHERANCE OF THE CRIME BECOMES THE ACT OF ALL THE COCONSPIRATORS. THEREFORE, EACH CONSPIRATOR IS LIABLE FOR ALL OFFENSES WHICH ARE COMMITTED IN FURTHERANCE OF THE CONSPIRACY BY ANY OF THE COCONSPIRATORS WHILE THE CONSPIRACY CONTINUES AND THE PERSON REMAINS A PARTY TO IT. THIS IS TRUE EVEN THOUGH EACH DOES NOT PARTICIPATE IN, OR HAVE KNOWLEDGE OF, ALL OF THE DETAILS OF THE EXECUTION OF THE CONSPIRACY. FOR EXAMPLE, IF THREE SOLDIERS AGREE TO ROB THE ON-POST BANK, ALL WOULD BE CRIMINALLY LIABLE FOR ROBBERY AND MURDER IF ONE OF THE SOLDIERS SHOT AND KILLED THE CLERK DURING THE ROBBERY. THE SOLDIER WHO WAS OUTSIDE IN THE GETAWAY CAR WAITING TO DRIVE THE OTHER TWO FROM THE BANK AFTER THE ROBBERY IS CRIMINALLY LIABLE FOR THE MURDER EVEN IF THE CONSPIRATORS SPECIFICALLY AGREED AHEAD OF TIME NOT TO HURT ANYONE. THE DEATH OF THE ROBBERY VICTIM IS REASONABLY FORESEEABLE. THEREFORE, ALL CONSPIRATORS WILL BE CRIMINALLY LIABLE FOR THAT MURDER EVEN THOUGH THEY AGREED NOT TO HURT ANYONE. ALSO, NOT BEING IN THE BANK WHEN THE SHOOTING OCCURRED WILL NOT RELIEVE OUR DRIVER-CONSPIRATOR OF HIS CRIMINAL LIABILITY FOR THE MURDER.

4. Termination of the Conspiracy.

The longer a conspiracy has gone on, the greater the likelihood that additional people may have joined it, thus broadening the focus of an investigation. Additionally, since the statute of limitations on a particular crime does not normally begin to run until after a crime is complete, pinpointing the end of the conspiracy might determine whether the individual may be prosecuted for the crime at all. Finally, statements made by conspirators against each other may be admissible, as long as they were made while the conspiracy was still in progress.

A person cannot be convicted of conspiracy if he effectively withdraws before an overt act is committed. Part IV, para 5c(6), (MCM 1984) If a conspirator withdraws from the conspiracy after the performance of an overt act by one of the coconspirators, he remains guilty of conspiracy and guilty of any offenses which were committed in furtherance of the conspiracy by the other conspirators up to the time of the withdrawal. However, he is not liable for offenses committed by the remaining conspirators after his withdrawal. Part IV, MCM, 1984, para 5c(6).

Withdrawal from a criminal conspiracy requires an affirmative act sufficient to show the individual desires to disassociate himself with the conspiracy. Mere passive noninvolvement in the final stages of the crime is insufficient to constitute a withdrawal from the conspiracy. United States v. Murphy, CM 435, 280 (ACMR, 19 Oct 78). Withdrawal requires conduct that is totally inconsistent with adherence to the conspiracy, and which shows that the individual has severed all connection with it. A conspirator can effectively withdraw from a conspiracy by reporting it to command or law enforcement authorities. Part IV, MCM, 1984, para 5c(6).

5. Punishment. An individual subject to the UCMJ who is found guilty of conspiracy is subject to the maximum punishment for the offense which is the object of the conspiracy. However, the death penalty may not be imposed. Part IV, MCM, 1984, para 5(e).

Conspiracy and the substantive offense which is the object of the conspiracy are separately punishable. The philosophy for this rule was set forth by the Supreme Court in Callanan v. United States, 364 U.S. 587, 81 SCt 321, 5LEd2d 312 (1961). Rehearing denied 365US 825, 81 SCt 687, 5 LEd2d 703 (1961).

> "Collective criminal agreement--partnership in crime--presents a greater potential threat to the public. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from the path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed."

Because of this, conspiracies are held to be specifically punishable because of the added danger they pose to society.

E. Solicitation (Articles 82/134, UCMJ). Article 82 provides that a person who solicits or advises another to desert, mutiny, commit an act of misbehavior before the enemy, or sedition is guilty of solicitation. This is a very specific offense which deals only with the listed crimes. Solicitation under Article 134 covers the crime of soliciting another to commit any offense other than those listed within Article 82.

It is important to note that this is a specific intent offense, the accused must specifically intend for the solicited individual to commit the crime solicited.

The solicitation itself may be made orally or in writing and encompasses any act or conduct which reasonably may be construed as a serious request or advice to commit the crime in issue. The offense is complete when the suggestion is made or advice is given with the required wrongful intent to influence another to commit the crime. The persons to whom the suggestions are made or the advice is given need not agree to act upon the suggestion or advice in order to complete the crime. The crime is complete upon the asking or advice.

QUESTION: WHAT IF HE DOES AGREE TO COMMIT THE OFFENSE?

ANSWER: THERE IS AN AGREEMENT TO COMMIT THE OFFENSE. IF ONE OF THE CONSPIRATORS COMMITS THE REQUISITE OVERT ACT, THEN THE OFFENSE OF CONSPIRACY HAS BEEN COMMITTED.

F. Lesser Included Offenses.

A lesser included offense is a crime which is necessarily included in the charged offense. One example of this would be the lesser included offense of robbery is larceny. Housebreaking would be a lesser included offense of burglary because they both prescribe the same basic conduct, that is the unauthorized entry into the structure of another with the intent to commit a criminal offense therein. However, burglary is a greater offense because of the specific requirements of breaking and entry into a dwelling house at nighttime with intent to commit certain serious offenses therein.

Lesser included offenses are important because the court-martial may find an accused guilty of a lesser included offense when it finds the prosecution has failed to prove the charged offense beyond a reasonable doubt. Moreover, reviewing authority might choose to approve only a finding of the lesser included offense. Because of these facts, investigators must prepare their investigative reports being aware of the range of possible offenses of which an accused might be convicted. Only with this foresight can the law enforcement officer be assured that the facts he has gathered are sufficient to satisfy the elements of proof required for these various offenses.

PART I - DEFENSES TO CRIMINAL LIABILITY

The accused in a criminal case is not required to present any evidence, or prove he is innocent. Rather, the prosecution has the burden to establish his guilt beyond a reasonable doubt. Frequently, however, the accused will raise various defenses which he claims, establish his innocence or raise reasonable doubt. He may claim that even though he committed the acts charged, he is still not criminally responsible based on one or more of the following defenses.

A. Intoxication. Voluntary intoxication, whether caused by alcohol or drugs, is not a complete defense. The defense may, however, try to show that the intoxication made the accused unable to form a specific intent. (RCM 916(1) (2).) In a case of assaulting an MP, the defense might try to show the accused was so intoxicated that he didn't know the status of the victim. U.S. v. Martinez, 14 MJ 647 (ACMR 1982). If it is a general intent crime, the voluntary intoxication is irrelevant. U.S. v. Gertson, 15 MJ 990 (NMCMR 1983).

In U.S. v. Prince, 24 MJ 643 (AFCMR 1987), the accused "denied that he had knowingly used cocaine. He testified that he had learned shortly before trial that his wife had surreptitiously slipped cocaine powder into a mixed drink she prepared for him...the appellant's wife testified that she had, indeed, placed cocaine in her husband's drink without telling him. She explained that she was attempting to find a way to improve her husband's sexual performance and had used cocaine at her sister's suggestion that it

might act as an aphrodisiac." Such facts, if true, would be a defense to criminal liability. Involuntary intoxication, then, is a defense. The same result came in U.S. v. Mow, 22 MJ 906 (NMCMR 1986). There, the accused argued that he had unknowingly ingested marijuana by eating some rum raisin balls. In both cases the use of the controlled substance must be knowing. If the accused's story is believed, the involuntary intoxication is a complete defense.

QUESTION: WHAT IF THE ACCUSED IS AN ALCOHOLIC?

ANSWER: IN U.S. V. SCHUMACHER, 11 MJ 612 (ACMR 1981), THE COURT HELD THAT THE ACCUSED KNEW THE CONSEQUENCES OF DRINKING, AND HIS DOING SO WAS A VOLUNTARY ACT. DRUNKENNESS IS NOT ITSELF A DEFENSE AND "THE LAW DOES NOT DISCRIMINATE IN FAVOR OF A DRUNK." U.S. V. RIEGE, 5 MJ 938 (NCMR 1978).

QUESTION: WHAT IF THE ACCUSED THINKS HE IS CONSUMING ONE ILLEGAL DRUG AND HE ACTUALLY CONSUMES ANOTHER; I.E., COCAINE INSTEAD OF SPEED?

ANSWER: THE ACCUSED KNEW HE WAS CONSUMING A CONTRABAND DRUG. THUS, THIS IS NOT "INVOLUNTARY INTOXICATION," AND IT IS NO DEFENSE. U.S. V. WARD, 14 MJ 950 (ACMR 1982).

The accused will have to show he was intoxicated and that his mental facilities were really impaired. This requires more than just showing he drank a few beers. U.S. v. Deavers, 7 MJ 677 (AMCR 1979).

QUESTION: HOW DO YOU SHOW INTOXICATION?

ANSWER: HOW DID THE ACCUSED ACT AT THE TIME OF THE CRIME? DID THE ACCUSED ENGAGE OTHERS "IN LUCID CONVERSATION?" WAS HE COGNIZANT OF EVERYTHING HAPPENING AROUND HIM? IN ONE CASE INVOLVING ARSON, THE ACCUSED RESPONDED TO A FIRE CHIEF'S ORDER TO DEPART HIS ROOM AND REQUIRED NO ASSISTANCE TO DO SO. THE COURT WAS CONVINCED THAT THE ACCUSED WAS NOT INTOXICATED. U.S. V. JOHNSON, 15 MJ 676 (AFCMR 1983). IN ANOTHER CASE, THE ACCUSED "WAS ABLE TO CONVERSE COHERENTLY WITH THE GATE GUARDS." IN TERMS OF THE ARSON OF AN AUTOMOBILE, HE "WAS ABLE TO MANIPULATE AND ENTER A LOCKED CAR, EMPTY THE CONTENTS OF A GLOVE BOX, AND SET THEM ON FIRE WITHIN THE CAR AND THEN EXIT THE VEHICLE. DISCOVERED BY THE OWNER OF THE CAR, APPELLANT FLED AND WAS ABLE TO ELUDE HIS PURSUER FOR SEVERAL HUNDRED YARDS."

QUESTION: WAS HE GUILTY?

ANSWER: YES. HE "WAS AWARE OF AND INTENDED THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACTS." U.S. V. REECE, 12 MJ 770 (ACMR 1981).

B. Insanity. The accused is not criminally liable for his actions if "at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his or her acts." Mental disease or defect does not otherwise constitute a defense (RCM 916(K) 1). This normally involves expert testimony, since mere "aberrant behavior does not constitute

insanity." U.S. v. Riege, 5 MJ 938 (NCMR 1978). A person is presumed to be sane. The accused must establish by clear and convincing evidence that he or she was not mentally responsible at the time of the offense RCM 916(k) (3) (A).

C. Accident. "A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable." This does not apply if the accused acted unlawfully or negligently. (RCM 916(f).)

QUESTION: IN ONE CASE, THE ACCUSED DECIDED TO LEAVE HIS ON-POST QUARTERS TO LOOK FOR HIS BROTHER, BELIEVED TO BE AT A LOCAL BAR. HE TOLD HIS WIFE TO GET HIS PISTOL, AS HE WAS GOING TO TAKE IT WITH HIM. SHE GAVE HIM THE PISTOL BUT ASKED THAT HE RECONSIDER GOING OUT. "THE ACCUSED THEN SAID THAT HE BETTER NOT GO BECAUSE IF SOMEONE MESSES WITH HIM HE "WOULD DO THIS." AT THAT TIME HE RAISED HIS HAND IN THE AIR, CHECKED TO SEE IF THERE WAS A CLIP IN THE GUN, AND "LOWERED MY HAND TOWARD HER." AT THAT TIME THE GUN FIRED, STRIKING HIS WIFE IN THE HEAD. EXPERT TESTIMONY SHOWED THE PISTOL WAS NO MORE THAN NINE INCHES FROM HER HEAD WHEN IT FIRED." IS HE NOT GUILTY BECAUSE OF ACCIDENT?

ANSWER: NO. HE IS GUILTY OF MURDER BY CULPABLE NEGLIGENCE. AN ACCIDENT "IS AN UNEXPECTED ACT NOT DUE TO NEGLIGENCE...TO BE EXCUSABLE AS AN ACCIDENT, THE ACT MUST HAVE BEEN THE RESULT OF DOING A LAWFUL ACT IN A LAWFUL MANNER, FREE OF NEGLIGENCE." HERE, HIS CONDUCT "CLEARLY CONSTITUTES NEGLIGENCE," SO THERE WAS NO DEFENSE. U.S. V. RODRIGUES, 8 MJ 648 (AFCMR 1979).

An accident involves three elements. First, the accused must have been engaged "in an act not prohibited by law, regulation, or order." Second, this act must "have been performed in a lawful manner; i.e., with due care and without simple negligence." Finally, the act must be done "without any unlawful intent." U.S. v. Ferguson, 15 MJ 12 (CMA 1983).

QUESTION: THE ACCUSED PULLS A KNIFE AND "CAME AT HIM IN A PLAYFUL MANNER WITH THE OPEN KNIFE." THE VICTIM IS "ACCIDENTALLY" STABBED. IS THIS A DEFENSE?

ANSWER: NO. AN INJURY OCCURRING AS A RESULT OF SUCH HORSEPLAY IS NO DEFENSE. "BRANDISHING AN OPEN KNIFE IN THE DIRECTION OF ANOTHER AT CLOSE QUARTERS IS A NEGLIGENT ACT ACCOMPANIED BY A CULPABLE DISREGARD FOR THE FORESEEABLE CONSEQUENCES," DESPITE THE ACCUSED'S LACK OF INTENT TO HURT THE VICTIM. UNINTENTIONAL DOES NOT EQUAL ACCIDENT, WHERE THE ACCUSED IS ACTING IN A NEGLIGENT MANNER. U.S. V. LEACH, 22 MJ 738 (NMCMR 1986). FOR THE DEFENSE OF ACCIDENT TO APPLY, THE ACCUSED MUST ACT WITH "REASONABLE CARE AND DUE REGARD FOR THE LIVES OF OTHERS." U.S. V. LETT, 9 MJ 602 (AFCMR 1980).

D. Impossibility/inability. It is a defense to refuse or fail to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty. RCM 916(i). It is not a defense, however, if the inability occurred "through the accused's own fault or design."

QUESTION: THE ACCUSED HAS BEEN ORDERED TO GET A HAIRCUT. HE SPENDS HIS MONEY ON A NEW STEREO AND NOW CANNOT AFFORD THE HAIRCUT. IS THIS A DEFENSE?

ANSWER: NO, AS IT'S HIS OWN FAULT HE CAN NOT COMPLY WITH THE OTHERWISE LAWFUL ORDER TO GET A HAIRCUT.

This issue frequently arises in AWOL cases. In one case the accused argued that "his car broke down as he left home for work, and he couldn't report to his unit for almost two days." The court explained that it is a valid defense that the person was prevented from returning to work by sickness or other disability, or a natural disaster. Here, however, the accused "made no legitimate effort to get substitute transportation" and was at fault. Thus, the defense of impossibility or inability did not apply. U.S. v. Lee, 14 MJ 633 (ACMR, 1982).

U.S. v. Williams, 21 MJ 360 (CMA, 1986), the accused failed to return from leave for three years. While on leave, he lost his wallet, which contained his airline ticket, all of his money, and his leave papers. The court explained that even if the defense initially applies, "it can be defeated if it is shown that the accused did not exert sufficient effort to overcome the inability." Here, there was another military base and a reception station within a few miles of his home. Thus, his absence for three years was not "through no fault of his own."

E. Coercion/duress. "It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply." (RCM 916(h).)

QUESTION: THE ACCUSED IS GIVEN A LAWFUL ORDER BY HIS COMMANDING OFFICER. HE ARGUES THAT COMPLIANCE WITH THE ORDER WOULD SUBJECT HIM TO DANGER. IS THIS A DEFENSE?

ANSWER: NO. THE COURT HELD THAT SUCH AN ARGUMENT "STRAINS CREDULITY." U.S. V. TALTY, 17 MJ 1127 (NMCMR 1984).

It is not enough that the accused owed a debt and commits a crime (robbery, larceny, etc.) in order to obtain the money to pay it. U.S. v. Barnes, 12 MJ 779 (ACMR 1981). It would be different if he not only owed the money, but commits the crime because of an immediate threat to his wife. U.S. v. Paulus, 13 MJ 179 (CMA 1982).

In one case, the accused was threatened by a group of people who discovered he was an undercover informant. He went AWOL and then claimed duress. The court held it was no defense since he had not informed the chain of command of the threat. He, therefore, had a reasonable opportunity to avoid any injury by reporting the incident. U.S. v. Campfield, 17 MJ 715 (NMCMR 1983).

QUESTION: WHAT IF THE ACCUSED DOES REPORT THE PROBLEM, AND THE CHAIN OF COMMAND IS NOT RESPONSIVE?

ANSWER: UNDER SUCH FACTS, THE COURT CONCLUDED THAT THE ACCUSED DID NOT HAVE A REASONABLE OPPORTUNITY TO AVOID THE UNAUTHORIZED ABSENCE. U.S. V ROBERTS, 14 MJ 671 (NMCMR 1982), AFF'D 15 MJ 106 (CMA 1983).

F. Alibi. The accused "is entitled to an acquittal if on all the evidence, including the evidence relating to an alibi, there is a reasonable doubt as to his guilt." In the case of an alibi defense, the accused seeks "to create in the mind of the triers of fact a (reasonable) doubt concerning the accused's whereabouts at the time in question." U.S v. Davis, 22 MJ 829 (NMCMR 1986). The accused claims "that he was at another place when the crime was committed." The actual distance is not controlling "so long as it is sufficient to show that the defendant was too far away to have committed the offense. Even if the government evidence shows that a crime has occurred in one room of a two-room building, the defense of alibi would be raised if there is evidence that the accused was in the other room." U.S. v. Brooks, 25 MJ 175 (CMA 1987). Note that " 'alibi'...(is) not a special defense, as (it) operates to deny that the accused committed one or more of the acts constituting the offense." RCM 916(a).

G. Self-defense.

1. Homicide or assault cases involving deadly force. It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:

a. Apprehended, on reasonable grounds, that death or serious bodily harm was about to be inflicted wrongfully on the accused; and

b. Believed that the force the accused used was necessary for protection against death or grievous bodily harm. Further, the term "involving deadly force" describes the factual circumstances of the offense, not specific assault offenses. The test for self-defense is objective. The accused's apprehension of death or serious bodily harm must be one which a reasonable, prudent person would have held under the circumstances. RCM 916e(1).

QUESTION: MUST THE ACCUSED RETREAT?

ANSWER: NO, BUT IT IS A RELEVANT CIRCUMSTANCE IN DETERMINING IF THE ACCUSED REASONABLY APPREHENDED THAT DEATH OR GRIEVOUS BODILY HARM WAS ABOUT TO BE INFLICTED ON HIM. U.S. V. CLAYBORNE, 7 MJ 528 (ACMR 1979).

QUESTION: WHAT IF THE ACCUSED IS ATTACKED, AND HE RESPONDS WITH A WEAPON HE IS CARRYING IN VIOLATION OF A POST REGULATION (GUN, SWITCHBLADE KNIFE, ETC.) ?

ANSWER: HE MAY, OF COURSE, BE PROSECUTED FOR VIOLATING THIS PRESUMABLY PUNITIVE REGULATION BY CARRYING THE WEAPON. THIS FACTOR DOES NOT, HOWEVER, DEFEAT A CLAIM OF SELF-DEFENSE. U.S. V. CLAYBORNE, 7 MJ 528 (ACMR, 1979).

QUESTION: SUPPOSE THE ACCUSED IS SIX INCHES SHORTER AND 50 POUNDS LIGHTER THAN THE ALLEGED VICTIM IS THIS RELEVANT?

ANSWER: YES. THESE FACTS AFFECT THE REASONABLENESS OF THE ACCUSED'S APPREHENSION THAT DEATH OR GRIEVOUS BODILY HARM WAS WRONGFULLY GOING TO BE INFLICTED ON HIM, RCM 916(e). ANOTHER FACTOR IS THE VICTIM'S REPUTATION FOR BEING "AGGRESSIVE, ANGRY, AND QUICK-TEMPERED." U.S. V. SHUFFORD, 7 MJ 716 (ACMR 1979). ALL OF THESE FACTORS "COULD SUPPORT A REASONABLE CONCLUSION ON THE PART OF THE APPELLANT THAT GRIEVOUS BODILY HARM MIGHT RESULT FROM A FIGHT WITH (THE VICTIM)." U.S. V. MARTINEZ, 12 MJ 601 (NMCMR 1981).

QUESTION: THE ACCUSED IS ATTACKED BY A MUCH LARGER SOLDIER AND REASONABLY APPREHENDS THAT HE IS GOING TO SUFFER GRIEVOUS BODILY HARM. TO DEFEND HIMSELF, THE ACCUSED GRABS A PIPE AND THROWS IT AT THE ASSAILANT. HE MISSES AND STRIKES AN INNOCENT THIRD PARTY. IS HE GUILTY OF ASSAULTING THE THIRD PARTY?

ANSWER: NO. HE ACTED REASONABLY IN SELF-DEFENSE. THE UNINTENDED INJURY TO THE THIRD PARTY IS, THEREFORE, AN ACCIDENT. U.S. V. TALLIAU, 7 MJ 845 (ACMR 1979).

QUESTION: CAN A PERSON DEFEND A THIRD PARTY?

ANSWER: YES. A PERSON MAY ACT IN DEFENSE OF ANOTHER, BUT MAY NOT USE MORE FORCE THAN THE PERSON DEFENDED WAS LAWFULLY ENTITLED TO USE IN HIS OWN DEFENSE RCM 916 (e) 5.

2. Use of nondeadly force. The elements here are: (1) that the accused apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on him; and (2) that the accused believed that the force used "was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm." RCM 916(e) (3) Self-defense, then, may be used against the lesser forms of assault. U.S. v. Sawyer, 4 MJ 64 (CMA 1977).

A good example is U.S. v. Jones, 3 MJ 279 (CMA 1977). The assailant hit the accused in the face. The accused responded by hitting the assailant...who died. Although the accused didn't fear death or grievous bodily harm, he was still acting in self-defense. Since the accused acted lawfully, by using nondeadly force to repel an assault consummated by a battery, he could not be convicted of any offense causing the victim's death.

3. Loss of right to self-defense. "The right to self-defense is lost" and these defenses do not apply "if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension." Self-defense is available to the accused in these situations, if he "had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred." RCM 916(e) (4).

4. Parental Discipline Defense.

There have been several cases involving soldiers convicted of assault on a child under age 16 in violation of Article 128, UCMJ, when the accused is the parent or step-parent of the victim. The accused has raised the parental discipline defense arguing that his action was a legitimate exercise of his parental authority. Before this defense will be successful, the court must find that the accused was the child's parent, guardian, or someone else responsible for general care and supervision of the child, or someone acting at the request of the parent or guardian. Secondly, the accused must have used force to safeguard or promote the child's welfare including actions to prevent or punish the child's misconduct. Thus, the accused must have had a proper disciplinary motive when he struck the child. Finally, the accused must have used the proper degree of force in disciplining the child. An improper degree of force is one designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain, extreme mental distress, or gross degradation. US vs. Robertson, 36 MJ 190 (C.M.A. 1992) and US vs. Brown, 26 MJ 148 (C.M.A. 1988).

The accused's seven year old daughter got up from her nap, went through her mother's possessions, and sprayed her mother's perfume on a bed pillow. The Court found the accused as her father was the proper party to discipline her and that he had a legitimate parental disciplinary purpose in punishing his daughter for her misconduct. However, the Court found he used unreasonable force when he used a belt and struck her hard on her buttocks numerous times. The next day she refused to sit down at school. The pediatrician who examined her felt the injuries warranted an X-ray to determine how extensive her injuries were. The accused's assault conviction was upheld. US vs. Robertson, 36 MJ 190 (C.M.A. 1992). In another case, the accused "whipped" his seven year old stepson with a belt for stealing a quarter from his teacher's desk. This produced welts and "bad bruising" on the child. The Court found that, while the accused was the proper disciplinary party and the child properly needed discipline, the method employed was excessive force. The accused's conviction was upheld. US vs. Brown, 26 MJ 148 (C.M.A. 1988).

In US vs. Ward, 39 MJ 1085 (ACMR 1994), the mother left her 3 year old son in the care of the accused who was her boyfriend. The child knocked over a candle, but when confronted he denied culpability. The accused spanked him on his buttocks with his hand. Then two or three times the accused asked the child if he knocked over the candle. After each negative response, the accused slapped the child in the face. The Court found the accused to be a proper disciplinary party as the agent of the mother. Further, the Court held the accused had a proper disciplinary motive based on the child's misconduct. Moreover, the Court found that the accused used the proper degree of force in spanking the child on his buttocks. However, at trial a medical doctor testified that he slapped the child on his face with such significant force that the child could have been knocked off his feet. The Court concluded by finding that in this regard the accused used "excessive force" known to create a substantial risk of causing serious bodily injury, extreme pain, or mental distress. Therefore, the Court affirmed his conviction of assault by slapping the child in the face.

In US vs. Ziots, 36 MJ 1007, (ACMR 1993), the Court found that the accused used excessive force in disciplining his three year old stepson even though he acted out of a proper parental disciplinary motive. When the child refused to put away his toys when told to do so and talked back to the accused, he grabbed the child's cheeks and squeezed. As the child squirmed, the accused squeezed harder. Later, the child denied taking out a grease gun and squirting grease on the floor. For these acts of misconduct, the accused hit the child with his fist in the face near his eyes and on his back four times. As the child squirms, the accused hit him in the rib cage. The accused then told his stepson to stand in the corner for a specified period. The child stood for a while, but strayed away from the corner. As punishment for this misconduct, the accused pushed the child back into the corner causing him to hit his head and stomach on the wall. On the basis of this evidence, the Court upheld the accused's conviction for assault.

In US vs. Gowadia, 34 MJ 714 (ACMR 1992), the Court found the accused properly disciplined his twelve year old stepson by striking him on the back of his legs with a military uniform belt with the buckle and metal tip removed. However, the Court upheld the accused's aggravated assault conviction on the same child based on the accused's unusual "counseling techniques." The accused was properly counseling his stepson for poor school performance and failure to complete his assigned chores. When the child failed to respond appropriately, the accused became frustrated. With the assistance of his wife, he tied up the child's hands and feet and placed a plastic bag over his head for a "short time." Thereafter, he removed the bag and the restraints and continued the counseling. The actions went beyond reasonable and moderate force necessary for parental discipline the Court concluded.

Finally, in US vs. Scofield, 33 MJ 857 (ACMR 1991), the accused disciplined his eight year old son who repeatedly came home late from school. With each violation, the accused gradually increased the degree of punishment. At first he spoke to his son. Then he sent him to bed early. Eventually, he withheld certain privileges from his son. These disciplinary measures were unsuccessful. As a result, when the child came home from school late the last time, the accused spanked him on the buttocks and thighs between six and ten times with a leather belt. Meanwhile, the accused's seven year old daughter stole earrings from her babysitter and denied any involvement in the theft. After she too failed to respond appropriately to other corrective action, the accused used the leather belt on her buttocks and thighs. The Court found the accused acted with a proper disciplinary motive with both his children. Further, the Court found no evidence of serious injury or bruises as a result of this discipline. His actions did not create a substantial risk of excessive injury. Therefore, the Court set aside the accused's assault convictions.

The courts in all these cases resolve the use of force issue by looking at the age of the child, where and with what did the accused hit the child, and what he used to strike the child.

H. Entrapment. "It is a defense that the criminal design or suggestion to commit the offense originated in the government and the accused had no predisposition to commit the offense." It is not entrapment when government agents "merely afford opportunities or facilities for the commission of the offense." The issue, again is whether the accused was predisposed to commit the crime. U.S. v. Higerd, 26 MJ 848 (ACMR 1988). Entrapment is where "the criminal conduct is the product of the creative activity of law enforcement officials." RCM 916(g).

QUESTION: WHY IS THIS A DEFENSE?

ANSWER: THE COURTS FEEL THAT "THE GOVERNMENT SHOULD NOT BE ABLE TO PUNISH CRIMINALLY A PERSON WHO WAS OF A LAW-ABIDING MIND BEFORE THE GOVERNMENT WON CONVERSION TO CRIME." IT MAY, HOWEVER, CONVICT ONE "WHO STANDS READY TO COMMIT AN OFFENSE WHEN PRESENTED WITH AN APPROPRIATE OPPORTUNITY." U.S. V. BLACK, 8 MJ 843 (ACMR 1980). THE KEY TO ENTRAPMENT IS THE ACCUSED'S PREDISPOSITION TO COMMIT THE CRIME. U.S. V. GONZALEZ-DOMINICCI, 14 MJ 4326 (CMA 1983). IN OTHER WORDS, THE KEY IS WHETHER THE ACCUSED HAS A "LATENT PREDISPOSITION TO COMMIT THE CRIME, WHICH IS TRIGGERED BY THE GOVERNMENT INDUCEMENT." U.S. V. JOHNSON, 18 MJ 76 (CMA 1984).

QUESTION: WHAT ARE THE RELEVANT FACTORS?

ANSWER: IN U.S. V. DAVIS, 14 MJ 628 (AFCMR 1982), "THE INFORMANT APPROACHED THE ACCUSED NUMEROUS TIMES OVER A SIX- TO EIGHT-WEEK PERIOD AND ASKED HIM TO OBTAIN COCAINE. THE ACCUSED STATED HE HAD NEVER SOLD COCAINE BEFORE AND DID SO THIS TIME ONLY BECAUSE THE INFORMANT KEPT ASKING HIM." THESE FACTS RAISED THE ENTRAPMENT DEFENSE.

QUESTION: WHAT IF THE ACCUSED ACTS OUT OF A PROFIT MOTIVE?

ANSWER: THE ACCUSED'S NEED FOR MONEY "IS A RELEVANT FACTOR TO BE CONSIDERED WHEN DETERMINING THE ELEMENT OF PREDISPOSITION." U.S. V. ECKHOFF, 23 MJ 875 (NMCMR 1987). THE ACCUSED CAN STILL SHOW HE WAS ENTRAPPED. THE ISSUE WOULD BE WHETHER HIS FINANCIAL VULNERABILITY "HAD BEEN EXPLOITED BY THE GOVERNMENT AGENT." ALSO, THE PROFIT MOTIVE "MIGHT HAVE BEEN GOVERNMENT INDUCED." U.S. V. O'DONNEL, 22 MJ 911 (AFCMR 1986).

QUESTION: IF THE ACCUSED HAS PREVIOUSLY POSSESSED DRUGS (NO ENTRAPMENT ISSUE), CAN HE STILL ARGUE HE WAS ENTRAPPED INTO DISTRIBUTING THEM?

ANSWER: YES. THESE ARE SEPARATE CRIMES. U.S. V. ECKHOFF, 23 MJ 875 (NMCMR 1987). THE FACT THAT THE ACCUSED HAS POSSESSED AND USED AN ILLEGAL DRUG DOES NOT AUTOMATICALLY MEAN HE CANNOT BE ENTRAPPED INTO SELLING THEM. THE ISSUE IN SUCH A CASE IS WHETHER "THE IDEA OF SELLING THEM WAS FIRST PLANTED IN HIS MIND BY GOVERNMENT AGENTS." U.S. V. BAILEY, 21 MJ 244 (CMA 1986).

QUESTION: IF AN ACCUSED HAS BEEN ENTRAPPED IN MAKING A SALE TODAY, WHAT IF HE MAKES ADDITIONAL SALES TOMORROW OR NEXT WEEK?

ANSWER: IT'S A QUESTION OF FACT FOR THE COURT TO RESOLVE. THE COURTS FEEL IT "WOULD SEEM CONTRARY TO PUBLIC POLICY TO PERMIT NARCOTICS AGENTS TO USE ANY TRICKERY TO INDUCE A SALE, THEN MAKE SUBSEQUENT BUYS, AND, BY NOT CHARGING THE FIRST SALE, INSULATE SUBSEQUENT TRANSACTIONS FROM THE EFFECT OF THEIR MISCONDUCT." AT THE SAME TIME, "ONCE ENTRAPPED DOES NOT NECESSARILY MEAN ALWAYS ENTRAPPED." THE LATER OFFENSES MAY BE "ATTENUATED FROM THE INITIAL INDUCEMENT." U.S. V. JURSNICK, 24 MJ 504 (AFCMR 1987). THE INITIAL ENTRAPMENT WILL NOT IMMUNIZE THE ACCUSED "FROM CRIMINAL LIABILITY FOR SUBSEQUENT TRANSACTIONS THAT HE READILY AND WILLINGLY UNDERTOOK." U.S. V. MEYERS, 1 MJ 1007 (ACMR 1986).

QUESTION: CAN I RAISE THE ISSUE OF ENTRAPMENT IF THE GOVERNMENT ENGAGES IN OUTRAGEOUS CONDUCT?

ANSWER: YES, ALTHOUGH THIS IS RARELY EMPLOYED. AN EXAMPLE OF OUTRAGEOUS CONDUCT BY A GOVERNMENT AGENT IS TARGETING AN EMOTIONALLY UNSTABLE SERVICEMEMBER, SEXUALLY AND EMOTIONALLY EXPLOITING HER, AND PLANTING DRUGS ON HER IN A "REVERSE STING" OPERATION. THIS VIOLATES THE FUNDAMENTAL NORMS OF MILITARY DUE PROCESS AND IS THE FUNCTIONAL EQUIVALENT OF ENTRAPMENT. UNITED STATES V. LEMASTER, 40 MJ 178 (CMA 1994).

I. Mistake of fact. It is a defense "that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." As an example, in a prosecution for larceny and filing a false claim, the accused could argue that he honestly thought he was married and that his common law wife had traveled with him. U.S. v. Groves, 19 MJ 8094 (ACMR 1985). The same is true for a prosecution for making false official statement. U.S. v. Hill-Dunning, 26 MJ 260 (CMA 1988).

It is a defense to a charge of robbery that the accused thought he was taking property that was lawfully his. This does not, however, excuse his crime of assault. U.S. v. Mack, 6 MJ 598 (ACMR 1978). One who "steals" under a claim of right, then, has no intent to commit larceny. U.S. v. Smith, 14 MJ 68 (CMA 1982). The same is true for one who thought the property was abandoned. U.S. v. Turner, 27 MJ 217 (CMA 1988). This defense only applies where the accused is seeking to reclaim a specific item of property, and not to the taking of money or other valuables in liquidation of a debt. U.S. v. Cunningham, 14 MJ 539 (ACMR 1982).

The defense of mistake will also apply to a case of larceny (without the robbery element). U.S. v. Jeft, 14 MJ 941 (ACMR 1982). In one case, for example, the accused had frequently borrowed a friend's car and believed he had permission to do so again on the day in question. Again, he had no intent to steal, as a result of his mistaken belief. U.S. v. Harville, 14 MJ 270 (CMA 1982).

In a rape case, the accused may argue that he thought the victim had consented. U.S. v. Dans, 27 MJ 543 (ACMR 1988). In one case, however, the accused tried to argue that he had made such an honest mistake even though he

was holding a knife in his left hand at the time the victim consented to sexual intercourse. The court was not convinced. U.S. v. Moody, 10 MJ 845 (NCMR 1981).

Another case involved a card game where the loser had to take a drink. After a quart of bourbon was consumed by the five players, the victim (one of the five) testified that she woke up in bed with one of them. The accused was charged with rape (although she didn't remember having sex with him). He argued he thought it was consensual, in that she was awake, responsive, and said his name once or twice. The evidence raised the mistake of fact defense due to "her appearance of consent," at least to the accused. The Court of Military Appeals returned the case to the Air Force of Military Review for an evidentiary hearing on this issue. U.S. v. Baran, 22 MJ 265 (CMA 1986). On further review, the government argued that the victim had been "too drunk to be capable of giving her consent." The Air Force Court held that whether or not she did consent, was a mistake of fact issue. The government had not proven beyond a reasonable doubt that there was no such mistake. The Court reversed the conviction. U.S. v. Baran, 23 MJ 736 (AFCMR, 1986).

COMMENT: If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake only needs to have existed in the mind of the accused in order to be a valid defense. However, if the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and have been reasonable under all the circumstances. Perhaps a simpler way of viewing the defense of mistake regarding general intent crimes is that an extra burden of reasonableness is placed upon the accused where the defense is raised to a crime where intent is not normally an issue.

EXAMPLE: Mistake of fact as to consent to intercourse was not reasonable when based on belief by accused that victim "would consent to intercourse with anyone." United States v. Traylor, 40 MJ 248 (CMA 1994). Mistake of fact must be honest and reasonable; one must exercise due care with respect to the matter at issue. United States v. True, 41 MJ 424 (CAAF 1995).

EXAMPLE: Mistake of fact as to lack of consent in a prosecution for rape is not reasonable if the 13 year old victim is a virgin who is so intoxicated that she would not have been able to consent or resist even if she was aware of the intercourse, notwithstanding her response of "Yeah" when the accused asked her if she "wanted to do it." United States v. Yarborough, 39 MJ 566 (ACMR 1994).

COMMENT: The United States Court of Appeals for the Armed Forces has expanded the applicability of the excuse of mistake of fact to sexual offenses in its decision in United States v. Strode, 43 MJ 29 (1995) In Strode, the CAAF held that the defense of mistake of fact is available to a military accused who is charged with committing indecent acts with a child under the age of sixteen if he had an honest and reasonable belief as to the age of the person and if the acts would otherwise be lawful were the prosecutrix age sixteen or older. The court reasoned that a mistake of fact as to the age of the victim may be

relevant in determining whether the conduct is indecent, service discrediting, or prejudicial to good order and discipline.

J. Claim of right. The defense of mistake of fact as to justification is often considered in tandem, or confused, with the defense of claim of right. The traditional rule of law in military practice was that a taking, obtaining, or withholding of property was not wrongful if done by a person who has a right to the possession of the property either equal to or greater than the right of the one from whose possession the property is taken, obtained, or withheld. See MCM, 1984 (Rev.Ed), pt.IV, Section 46c(l)(d), at IV-67. This claim of right also allowed a service member to seize another service member's property to satisfy a debt or acquire security for it. This rule was modified by the Court of Appeals for the Armed Forces in United States v. Gunther, 42 MJ 292 (1995). In Gunter, the CAAF held that a service member has no legal right to seize his debtor's property without the agreement of the debtor.

In conclusion, to be an effective criminal investigator, you must understand the elements of the offense which the accused may have committed. Also, you must understand the elements of defenses the accused may raise to avoid criminal liability. Then you can focus your investigation on evidence which will support or defeat the elements of the offenses and will support or refute the potential defenses in each case.

LESSON

PRACTICE EXERCISE

The following exercises are multiple choice. There are four alternatives to each exercise. You are to select the one alternative that is correct and indicate your choice by CIRCLING the letter corresponding to the correct choice directly on the exercise booklet. This is a self-graded lesson exercise, but DO NOT look up the correct answer from the lesson solution sheet until you have responded to the question. To do so will not help you to learn this material and your final examination score will tend to be lower than if you had followed the recommended procedure.

1. 2LT Wilson is watching television when he hears someone knocking on his door. Upon opening the door, 2LT Wilson sees his friend, 2LT Ross, who tells Wilson that he has just stolen a 9-mm pistol from his unit's arms room and has hidden it under the mattress in his quarters. Wilson does not offer to hide the weapon for Ross, but he does tell Ross that under the mattress is the first place the MP will look. Wilson advises Ross to disassemble the weapon, destroy the parts, and bury them. 2LT Wilson could properly be charged with:

A. nothing, as he had no criminal intent.
B. nothing, as he did not offer to hide the weapon for Ross.
C. larceny on a principals theory.
D. accessory after the fact.

2. Private Buster decides that marriage is not for him, so he asks his friend, PVT Brown, if Brown will kill his wife for him. PVT Buster offers PVT Brown $500 if Brown will kill her. PVT Brown tells Buster that he (Buster) is out of his mind and walks away. PVT Buster could be charged with:

A. nothing as no criminal act occurred.
B. conspiracy to commit murder.
C. solicitation under Article 82, UCMJ.
D. solicitating another under Article 134, UCMJ.

3. The accused and another soldier agree to break into the post exchange in order to steal stereo equipment. No specific plans were made, nor were any actions taken in furtherance of the crime. When the other soldier backed out of the agreement, the accused asked another friend to participate. The friend declined. At this point, the accused may properly be charged with:

A. no offense, as no crime was committed.
B. conspiracy to commit housebreaking and larceny.
C. solicitating another to commit housebreaking and larceny.
D. attempted housebreaking and larceny.

4. Two soldiers agree to a plan to break into vending machines on post and steal the money therein. The accused, one of the two soldiers, made a key to the machines in furtherance of the plan. The key did not fit the lock and both soldiers were apprehended as they were trying to open one of the machines. The accused may properly be charged with:

A. no offense as the key would not have opened the machine.
B. attempted larceny and conspiracy.
C. attempted larceny only.
D. conspiracy and larceny.

5. The accused broke into and entered the unit supply room one evening with the intent of stealing some field equipment. The supply sergeant who had worked late and had fallen asleep in a chair awoke and the accused ran away without taking anything. The accused has been charged with burglary. He may properly be convicted of:

A. burglary.
B. larceny.
C. attempted burglary.
D. housebreaking.

6. Which of the following is a true statement regarding specific intent crimes?

A. Intent is a necessary element of the crime and must be proven in order to secure a conviction.
B. Intent need not be proven because it is inferred from the commission of the criminal act itself.
C. Specific intent crimes can be committed by mistake.
D. None of the above.

7. Specific intent may be proven through:

A. circumstantial evidence.
B. the accused's statements.
C. both A and B.
D. none of the above.

8. Which of the following is a true statement regarding general intent crimes?

A. Intent is a necessary element of the crime and must be proven in order to secure a conviction.
B. The prosecution must prove that the accused's actions were not accidental.
C. General intent crimes cannot be committed by mistake.
D. None of the above.

9. The accused let PVT Bravo make a copy of his key to the unit supply room knowing that it would be used later in a larceny of unit supplies. The accused:

A. has not committed any offense.
B. is an accessory after the fact.
C. is a principal to the larceny.
D. is guilty of solicitation.

10. The accused was on a rifle range when he suffered a heart attack. At the onset of the attack, he jerked his weapon away from the target and pulled the trigger, causing the weapon to fire. A range guard was struck by the bullet and subsequently died from the wound. The accused, however, survived his heart attack. The accused may properly be charged with:

A. no offense.
B. negligent homicide.
C. manslaughter.
D. murder.

11. Private Ludlow returned home unexpectedly in the middle of the day. He found his wife in bed with his squad leader. Enraged by this discovery, Private Ludlow immediately seized the brass lamp on the nightstand and beat them both to death. What offense did Private Ludlow commit?

A. Involuntary manslaughter.
B. Premeditated murder.
C. Intentional murder.
D. Voluntary manslaughter.

12. The accused, SGT Smith, became involved in a fistfight with another soldier, SGT Green, in his company. Smith knocked Green to the ground and kicked him viciously several times in the stomach. The kicks ruptured Green's intestines and he had to have artificial tubes inserted into portions of his intestines. What is the most serious crime the accused has committed?

A. Aggravated assault intentionally inflicting grievous bodily harm.
B. Assault and battery.
C. Attempted voluntary manslaughter.
D. Attempted felony murder.

13. A soldier, armed with a pistol, forced a window lock on his commanding officer's house at 0130 hrs. and entered with the intent to steal a portable radio. The accused admits the above, but he states he could not find the radio and left. What is the most serious crime committed?

A. Burglary
B. Robbery.
C. Attempted burglary.
D. Housebreaking.

14. A private drew a military vehicle from the motor pool which he used in his official duties. After completing his duties, he visited his girlfriend off post in the vehicle, and was apprehended by the military police. The private has provided a sworn statement indicating that he was going to return the vehicle because he was only "borrowing" it anyway. Assuming that the private's story is believed, he has committed what offense?

A. No offense since he had a valid dispatch.
B. No offense as he was only "borrowing" the vehicle.
C. Wrongful appropriation of a government vehicle.
D. Larceny of a government vehicle.

15. A soldier knowingly pointed an unloaded automatic pistol at a private. The private did not know that the weapon was unloaded and was fearful of his life. What crime, if any, has been committed?

A. No offense.
B. Attempted assault.
C. Aggravated assault with a means likely to produce grievous bodily harm or death.
D. Simple assault.

16. Which of the following is an element of robbery?

A. Intent to steal.
B. Taking against the will of the victim.
C. Taking an object of value.
D. All of the above.

PRACTICE EXERCISE

ANSWER KEY AND FEEDBACK

Item	Correct Answer and Feedback	
1.	D.	Accessory after the fact is. An accessory after the fact is...(page 1-47, Part H, para B).
2.	D.	Solicitation under Article 134 UCMJ. Solicitation under Article 134 covers...(page 1-53, Part H, para E).
3.	C.	Solicitation to commit housebreaking and larceny. The solicitation itself may be...(page 1-53, Part H, para E).
4.	B.	Attempted larceny and conspiracy. There is a strong public policy for punishing...(page 1-47, Part H, para C). A conspiracy occurred when there is an...(page 1-50, Part H, para D).
5.	D.	Housebreaking. The accused can be convicted of housebreaking...(page 1-32, Part D, para E).
6.	A.	Intent is a necessary element of the crime and must be proven in order to secure a conviction. In specific intent crimes...(page 1-3, Part A, para B, 2).
7.	C.	Both A and B. First, don't overlook the obvious...(page 1-3, Part A, para B, 2).
8.	B.	The prosecution must prove that the accused's... The prosecution must...(page 1-3, Part A, para B, 1).
9.	C.	Is a principal to the larceny. Article 77 provides that any...(page 1-45, Part H, para A).
10.	A.	No offense. Whenever the law holds an...(page 1-18, Part B, para F).
11.	D.	Voluntary manslaughter. An unlawful killing...(page 1-14, Part B, para E, 1).
12.	A.	Aggravated assault intentionally inflicting grievous bodily harm. When grievous bodily harm has been... (page 1-8, Part B, para 2).

13. A. Burglary.
The accused can be convicted of burglary if...(page 1-33, Part E, para F).

14. C. Wrongful appropriation of a government vehicle.
Larceny requires that the...(page 1-29, Part E, para B).

15. D. Simple assault.
The term "simple assault"...(page 1-4, Part B, para A).
However, an unloaded pistol...(page 1-8, Part B, para C, 1d).

16. D. All of the above.
An accused will be convicted of robbery if...(page 1-30, Part E, para C).